RECORD AND BRIEFS

15-1256

No. 15-

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence to get their money back.

The Question Presented is whether this requirement is consistent with due process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shannon Nelson and Louis Alonzo Madden respectfully petition for a writ of certiorari to review the judgments of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court in *People v. Nelson* is reported at 362 P.3d 1070 (Colo. 2016). App 1a. The opinion of the Colorado Supreme Court in *People v. Madden* is reported at 364 P.3d 866 (Colo. 2016). App. 36a. The opinion of the Colorado Court of Appeals in *People v. Nelson* has not been published but is available at 2013 WL 1760903 (Colo. Ct. App. 2013). App. 50a. The opinion of the Colorado Court of Appeals in *People v. Madden* has not been published but is available at 2013 WL 1760869 (Colo. Ct. App. 2013). App. 64a.

JURISDICTION

The judgments of the Colorado Supreme Court were entered on December 21, 2015. The Colorado Supreme Court denied timely petitions for rehearing on February 8, 2016. App. 77a, 78a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Like many states, Colorado requires people convicted of crimes to pay various monetary penalties, including court costs, fees, and restitution. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Colorado keeps the money. The only way a person can get his or her money back is to prove, by clear and convincing evidence, that he or she is actually innocent of the charged offense.

Colorado's scheme is inconsistent with due process.

1. This certiorari petition consolidates two cases raising the same issue that were decided on the same day by the Colorado Supreme Court.

a. Petitioner Shannon Nelson was convicted in 2006 of five sexual assault offenses she allegedly committed against her children. App. 1a. In addition to a prison term, Nelson's sentence included several monetary charges that state law imposes only on defendants who are convicted. These were: (1) a $125 fee designated for Colorado's Crime Victim Compensation Fund;[1] (2) a $162.50 "surcharge" designated for Colorado's Victims and Witnesses Assistance and Law Enforcement Fund;[2] (3) a "docket fee" of $35;[3]

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[1] *See* Colo. Rev. Stat. § 24-4.1-119(1)(a). The statute currently sets the fee at $163, but it was $125 when Nelson was convicted.

[2] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(I). The statute currently sets the surcharge at $163, but it was $162.50 when Nelson was convicted.

(4) a "time payment fee" of $25;[4] and (5) restitution amounting to $7,845, for a total of $8,192.50. App. 2a.

Nelson's convictions were reversed on appeal. App. 2a. On retrial, she was acquitted of all charges. App. 2a. The Colorado Department of Corrections had already taken $702.10 from her inmate account in partial payment of the amount she no longer owed to the state—$125 for the Crime Victim Compensation Fund, $162.50 for the Victims and Witnesses Assistance and Law Enforcement Fund, and $414.60 for restitution. App. 2a n.1.

Soon after her acquittal, Nelson filed a motion seeking the refund of this money. App. 2a. She argued that the failure to return the money would constitute a denial of due process under the federal Constitution. App. 2a. The trial court concluded that it lacked the authority to order the state to refund the $702.10 it had taken from Nelson. App. 70a-73a.

b. Petitioner Louis Alonzo Madden was convicted in 2005 of attempting to patronize a prostituted child and attempted sexual assault. App. 37a. In addition to a prison term, Madden's sentence included: (1) the $125 fee designated for Colorado's Crime Victim Compensation Fund; (2) a $125 surcharge designated for the Victims and Witnesses Assistance and Law Enforcement Fund; (3) a $30 docket fee; (4) the $25 time payment fee; (5) a $2,000 "sex offender surcharge";[5] (6) a $128 fee for genetic testing of sex of-

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[3] *See* Colo. Rev. Stat. § 13-32-105(1).

[4] *See* Colo. Rev. Stat. § 16-11-101.6(1).

[5] *See* Colo. Rev. Stat. § 18-21-103(1).

fenders;[6] (7) a $1,000 "special advocate surcharge";[7] (8) a $45 fee for a "substance abuse assessment";[8] (9) a $25 fee for drug testing; and (10) $910 in restitution, for a total of $4,413. App. 37a.

On direct appeal, Madden's conviction for attempted patronizing was reversed, leaving only his conviction for attempted assault. App. 37a. That conviction was vacated on state collateral review. App. 37a-38a. The prosecutor chose not to retry the case. App. 38a. Madden had already paid the state $1,220 in fees and $757.75 in restitution he no longer owed, for a total of $1,977.75. App. 38a.

Madden moved for a refund of these payments. He alleged that the failure to return the money would constitute a denial of due process under the Fourteenth Amendment. App. 75a. The trial court granted Madden's motion with respect to the $1,220 in fees, but denied the motion with respect to the $757.75 in restitution. App. 76a.

2. The Colorado Court of Appeals reversed in both cases. App. 50a, 64a. The Court of Appeals determined that state law required refunding all the money that Nelson and Madden had paid.

In Nelson's case, the Court of Appeals reasoned that both fees and restitution "must be tied to a valid conviction." App. 53a. Because Nelson's convictions

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[6] *See* Colo. Rev. Stat. § 16-11-102.4.

[7] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(II)(A). The statute currently sets this surcharge at $1,300, but it was $1,000 when Madden was convicted.

[8] *See* Colo. Rev. Stat. § 18-1.3-209.

had been overturned, the court concluded, she was entitled to recover the amounts she had paid. App. 54a-57a. The Court of Appeals further concluded that Nelson could seek a refund in her pending criminal case without having to file a separate civil action. App. 57a-62a. The Court of Appeals noted that because it had ruled in Nelson's favor based on state law, it had no need to address her federal constitutional arguments. App. 62a.

The same panel of the Court of Appeals decided Madden's case on the same day. App. 64a. In a shorter opinion, the court applied the principles it had just elucidated in Nelson's case to conclude that Madden was also entitled to a refund of the amounts he had paid, and that he did not have to file a separate civil action. App. 65a-69a.

3. The Colorado Supreme Court reversed in both cases. App. 1a, 36a.

a. In Nelson's case, the court held that under state law, Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to -103, provides the exclusive remedy for people who seek refunds of fees and restitution when their convictions are reversed. App. 14a-20a. The court explained that the judiciary could authorize refunds from public funds only pursuant to statutory authority, App. 17a, and that the Exoneration Act is the only statute addressing the circumstances under which courts may authorize such refunds, App. 19a. Under the Exoneration Act, the court observed, an exonerated person is entitled to a refund of fines, penalties, and restitution, along with other compensation, if she can "prove, by clear and con-

vincing evidence, that she was 'actually innocent.'" App. 12a (quoting Colo. Rev. Stat. §§ 13-65-101(1)(a) and 13-65-102(1)(a)). Because Nelson had not filed suit under the Exoneration Act, the court concluded that the trial court lacked the authority to order a refund. App. 20a.

The Colorado Supreme Court then turned to Nelson's contention that due process requires a refund. App. 20a. The court rejected this contention as well. "We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted," the court concluded. App. 20a. "The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." App. 20a.[9]

The Colorado Supreme Court acknowledged that the Due Process Clause of the Fourteenth Amendment "requires, at a minimum, notice and the opportunity for a meaningful hearing before an impartial

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[9] Briefing in the Colorado Supreme Court focused entirely on state law, because the state was attacking, and Nelson and Madden were defending, Court of Appeals judgments that rested on state law. This Court nevertheless has jurisdiction to consider the Fourteenth Amendment due process issue that was raised by Nelson and Madden in the trial court, because the Colorado Supreme Court explicitly decided this issue, and indeed considered it at length. *See, e.g., Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (referring to "the 'elementary rule that it is irrelevant to inquire ... when a Federal question was raised in a court below when it appears that such question was actually considered and decided'" (quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914)).

tribunal." App. 21a (citations and internal quotation marks omitted). The court determined, however, that "due process does not require an automatic refund of fines paid in connection with a conviction" when that conviction has been reversed. App. 22a. The court concluded that the Exoneration Act "provides sufficient process for defendants to seek a refund of costs, fees, and restitution that they incurred while a conviction was in place." App. 22a.

Justice Hood dissented. App. 22a. He began by observing that "[b]ecause Nelson was never validly convicted, we presume she is innocent." App. 24a. Therefore, "just as the State was required to release Nelson from incarceration, it should also be required to release Nelson's money paid as costs, fees, and restitution." App. 25a. "I struggle," he explained, "to see how we can sanction a system that makes money immediately due without providing for its return when reversible error occurs." App. 25a.

Justice Hood concluded that the Exoneration Act is not an adequate remedy to comply with the requirements of due process. App. 28a. First, he explained, "requiring defendants who have never been validly convicted to resort to this Act flips the presumption of innocence. The Act establishes a separate civil claim that puts the burden on the petitioner to demonstrate her actual innocence by clear and convincing evidence." App. 28a.

Second, Justice Hood noted that "the Act is not geared toward refunds." App. 28a. He observed that the Exoneration Act provides, not just refunds, "but also $70,000 for every year of wrongful incarcera-

tion." App. 28a. "But Nelson is not seeking such broad relief; she is merely asking for a return to the status quo ante." App. 29a.

Third, Justice Hood explained that "the majority ignores the impracticability of bringing a separate civil action." App. 29a. Because defendants are not entitled to state-appointed counsel to bring claims under the Exoneration Act, "they must retain a lawyer or find one willing to work for free," both of which are unlikely prospects considering "the relatively low amounts available" when defendants merely seek the return of fees. App. 29a.

Finally, Justice Hood pointed out that the Exoneration Act provides no recourse whatsoever for defendants who have had money withheld due to misdemeanor convictions that have been reversed, because the Act only grants relief to people convicted of felonies. App. 29a n.1.

For these reasons, Justice Hood "respectfully disagree[d] with the majority's determination that the Exoneration Act provides 'sufficient process'" to comply with the requirements of the Due Process Clause. App. 29a.

b. The Colorado Supreme Court decided Madden's case on the same day. App. 36a. In a shorter opinion, the court applied the principles it had just expounded in Nelson's case. The court again explained that under state law the Exoneration Act is the exclusive means of obtaining a refund of fees and restitution when a conviction is vacated, and that because Madden had not filed suit under the Exoneration Act, the

trial court lacked the authority to grant a refund. App. 44a-45a.

Justice Hood again dissented. App. 45a.

The Colorado Supreme Court denied rehearing in both cases. App. 77a, 78a.

REASONS FOR GRANTING THE WRIT

Colorado appears to be the only state that requires defendants to prove their innocence before they can get a refund of monetary penalties when a conviction is reversed. It is hardly surprising that Colorado stands alone, because Colorado's scheme is so clearly contrary to due process.

I. Colorado violates the Due Process Clause by requiring defendants to prove their innocence by clear and convincing evidence to get a refund of monetary penalties when a conviction is reversed.

Colorado's scheme is inconsistent with due process, viewed from any angle. First, Colorado's scheme flouts due process by placing the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. Second, Colorado's scheme is contrary to the Court's repeated admonition that the Due Process Clause requires states to provide a clear and certain remedy to recover money the state has wrongfully withheld. Third, Colorado's scheme cannot be squared with the fundamental principles governing procedural due process. Finally, Colorado's scheme is contrary to traditional practice in both and civil and criminal cases, under which,

when a judgment is reversed, courts have always ordered the refund of money paid to satisfy the judgment.

A. Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties.

The most basic requirement of due process in criminal cases is that in order to impose a criminal penalty, the state must prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). The state may not shift its burden of proof to the defendant. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). In a criminal case, the Due Process Clause ensures that "a defendant has no obligation to prove his innocence." *District Attorney's Office v. Osborne*, 557 U.S. 52, 87 n.5 (2009) (Alito, J., concurring).

Colorado, by contrast, requires a defendant to prove her innocence. The state has taken $702.10 from Nelson and $1,977.75 from Madden, but neither stands convicted of any crime. To avoid these penalties, Nelson and Madden should not have to prove anything. The Due Process Clause places the burden of proof on Colorado if it wishes to keep their money, not on Nelson and Madden to get it back.

Indeed, Colorado defendants must not only prove their innocence, but they must prove it by clear and convincing evidence, which the Court has repeatedly

recognized as "a heavy burden." *Microsoft Corp. v. i4i Limited Partnership*, 131 S. Ct. 2238, 2246 (2011); *Cooper v. Oklahoma*, 517 U.S. 348, 361 (1996). The state may require defendants to satisfy this burden in order to recover in tort for having been wrongfully incarcerated (which is what the Exoneration Act is primarily intended to do). But the Due Process Clause bars the state from imposing this heavy burden on defendants who do not seek to recover in tort at all, but simply want a refund of monetary penalties when their convictions have been reversed.

B. Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld.

Where a state has collected a tax that is subsequently determined to have been unlawful, "due process requires a 'clear and certain' remedy" for obtaining a refund. *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)). As the Court has repeatedly admonished, "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 22 (1990). *See also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930); *Ward v. Love Cty. Board of Comm'rs*, 253 U.S. 17, 24 (1920).

This principle applies equally to monetary penalties collected by a state pursuant to a conviction that

is subsequently reversed. Just as a state cannot collect a tax and then, when the tax is found unlawful, refuse to provide a meaningful procedure for taxpayers to secure refunds, a state cannot impose monetary penalties for criminal convictions and then, when the convictions are reversed, refuse to provide a meaningful procedure for defendants to secure refunds. In both instances, the state is keeping property that belongs to its citizens. In both instances, the failure to provide a meaningful procedure is quite literally a deprivation of property without due process.

Colorado's Exoneration Act is not a "clear and certain" remedy for defendants to obtain refunds of monetary penalties the state is wrongfully withholding. It imposes a burden on defendants that is utterly irrelevant to the relief the defendants seek. The state collects fees and restitution from people who have been *convicted*, not from people who are factually guilty but have not been convicted. A defendant whose conviction has been reversed is entitled to a refund simply upon showing that her conviction has been reversed. Whether she can also prove that she is factually innocent, much less prove her innocence by clear and convincing evidence, is beside the point. Again, while the state may place obstacles in the path of defendants who seek to recover in tort for their wrongful incarceration, it may not place such obstacles in the path of those who merely want their money back when their convictions have been reversed.

Moreover, as a practical matter, Colorado's Exoneration Act is a complete barrier to defendants who merely seek a refund, because the sums involved are typically too small to justify the expense of a full-blown civil trial. Shannon Nelson is seeking the return of $702.10. Louis Madden is seeking the return of $1,977.75. No rational person would file suit under the Exoneration Act to recover such small amounts, and no rational lawyer would take such a case. The only plaintiffs who can realistically be expected to file suit under the Act are people seeking tort damages for wrongful incarceration, who are entitled to $70,000 per year of incarceration, plus another $50,000 per year if they were under a death sentence. Colo. Rev. Stat. § 13-65-103(3)(a). The Exoneration Act is an illusory remedy for people like Nelson and Madden, who just want a refund of small monetary penalties.[10]

To make matters worse, Colorado's Exoneration Act is not even available to many defendants. To recover under the Exoneration Act, a defendant must have been "convicted of a felony," the defendant must have been "sentenced to a term of incarceration," and the defendant must have "served all or part of such sentence." Colo. Rev. Stat. § 13-65-102(1)(a). Defendants who do not satisfy these requirements—including defendants who paid mone-

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[10] Although the Exoneration Act provides "[r]easonable attorney fees for bringing a claim under this section," Colo. Rev. Stat. § 13-65-103(2)(e)(IV), the Colorado courts have not yet had any opportunity to consider what would be a reasonable fee for bringing a suit to recover such small amounts, perhaps because no lawyer has been foolhardy enough to file one.

tary penalties pursuant to misdemeanor convictions, defendants who paid monetary penalties pursuant to felony convictions that did not involve a prison sentence, and defendants who paid monetary penalties pursuant to felony convictions and who were out on bail pending appeal—are ineligible to recover under the Exoneration Act. For these defendants, the Exoneration Act is not just an illusory remedy; it is no remedy at all.

C. Colorado's scheme is contrary to fundamental principles governing procedural due process.

In determining whether a procedure complies with the Due Process Clause, the Court has often undertaken "[t]he three-part inquiry set forth in *Matthews v. Eldridge*," which requires consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used ... ; and the Government's interest." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, all three factors indicate that Colorado's scheme is inconsistent with due process.

First, there is no doubt that people whose convictions have been reversed have a property interest in obtaining a refund of monetary penalties. It is their money, not Colorado's.

Second, Colorado's scheme poses an extraordinarily high risk of erroneously depriving such people of their property. Many defendants whose convictions

have been reversed are unable to prove their innocence by clear and convincing evidence. Most grounds for reversal involve legal errors that took place at trial. In such cases, reversal does not establish the defendant's innocence. Even a defendant who is subsequently acquitted, as Shannon Nelson was, is likely to be unable to prove her innocence by clear and convincing evidence. Nelson can show that she is not guilty beyond a reasonable doubt, but it is a far heavier burden for her to show by clear and convincing evidence that she is innocent. Indeed, the Exoneration Act specifies that a "court may not reach a finding of actual innocence pursuant to this section merely ... [b]ecause the court finds the evidence legally insufficient to support the petitioner's conviction." Colo. Rev. Stat. § 13-65-101(1)(b)(1).

Third, the government's interest is non-existent. Colorado has no legitimate reason to keep money that rightly belongs to people whose convictions have been reversed. It is not Colorado's money. What the state is doing is far more egregious than the asset freezes the Court recently found unconstitutional in *Luis v. United States*, No. 14-419 (Mar. 30, 2016). There, the government at least had good reason to expect that the money it sought to restrain would one day be forfeitable by virtue of a criminal conviction. Here, by contrast, the criminal proceedings have already terminated in the defendants' favor, and there is no chance that either defendant will be re-prosecuted. This money will never belong to Colorado.

Colorado's scheme flunks the three-part test of *Matthews v. Eldridge*. It serves no purpose other than allowing the state to keep property that belongs to its citizens.

D. Colorado's scheme is contrary to traditional practice, under which the reversal of a judgment has always required the refund of money paid pursuant to that judgment.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Where a state abrogates "settled usages and modes of proceeding," *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 277 (1855), and where "the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor Co.*, 512 U.S. at 430.

The traditional rule has always been that when a judgment is reversed, a person who paid money pursuant to that judgment is entitled to receive the money back. The Court has referred to this rule as "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919). As the Court explained, "[t]his right, so well founded in equity, has

been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution, and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error be restored to all things which he ha[d] lost by occasion of the said judgment." *Id.* (citation and internal quotation marks omitted).

This traditional rule is so commonsensical that one can find it stated over and over again, in cases and treatises alike. *See, e.g.*, *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution."); *Haebler v. Myers*, 30 N.E. 963, 964 (N.Y. 1892) ("Restitution was ... exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment but restored to the aggrieved party that which he had lost in consequence thereof."); *Restatement (First) of Restitution* § 74 ("A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside."); William A. Keener, *A Treatise on the Law of Quasi-Contracts* 417 (1893) ("a party who has paid money upon a judgment which has been subsequently reversed, may sue in a count for money had and received to recover the money so paid").

This is the traditional rule in criminal cases as well. Where the defendant paid a monetary penalty as a result of a conviction, and the conviction was subsequently reversed, the defendant has always been entitled to have his money refunded. *See, e.g.*, *United States v. Rothstein*, 187 F. 268, 269 (7th Cir. 1911) (after conviction reversed, agreeing with District Court that defendant "is of right entitled to the restitution of said $200 by him paid as a fine"); *Devlin v. United States*, 12 Ct. Cl. 266, 272-73 (1876) (after conviction reversed, court orders government to refund $10,000 fine); *New Jersey Society for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 117 (N.J. 1908) (after conviction reversed, court orders refund of $20 fine and $3.60 in costs); *Lucas v. Commonwealth*, 41 Pa. C.C. 673, 675 (Pa. Ct. of Comm. Pleas 1914) (after conviction reversed, court orders that "restitution of the fines and costs be made to the defendants"); *Merkee v. City of Rochester*, 13 Hun. 157, 162 (N.Y. Sup. 1878) (after conviction reversed, court orders "that the money which the plaintiff sued to recover was paid under the duress of a void judgment and could be recovered back"); *People ex rel. McMahon v. Board of Auditors*, 49 N.W. 921 (Mich. 1879) (unpublished opinion; headnote reads "Where a judgment imposing a fine is reversed after a defendant has paid the fine to avoid imprisonment, *mandamus* will lie to the board of auditors to refund the fine.").

Colorado followed this traditional practice until recently. *See, e.g.*, *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing conviction, ordering that "the parties be placed in *status quo* by refund to

the defendant of the sums paid as fine and costs"); *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1991) ("'a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of reversal, to be restored by his adversary to that which he has lost thereby'") (quoting *Arkadelphia Milling*, 249 U.S. at 145); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo. Ct. App. 1993) ("a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution").

Now, however, the Colorado Supreme Court has abrogated this traditional rule by construing the Exoneration Act, which was enacted in 2013, as the exclusive remedy for obtaining a refund of monetary penalties when a conviction is reversed. Colorado has replaced a fair and sensible procedure with one that virtually ensures that defendants will not get their money back. No matter how one looks at Colorado's scheme, it is flagrantly inconsistent with due process.

II. Colorado appears to be the only state that does not refund monetary penalties when a conviction is reversed.

There appears to be no other jurisdiction with a scheme like Colorado's. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed. They do not have to prove anything.

Several states mandate this result by statute. *See, e.g.*, N.Y. Penal Law § 60.35(4) ("Any person who has

paid a mandatory surcharge, sex offender registration fee, DNA databank fee, a crime victim assistance fee or a supplemental sex offender victim fee under the authority of this section based upon a conviction that is subsequently reversed ... shall be entitled to a refund."); Miss. Code § 99-19-73(12) ("The State Auditor shall establish by regulation procedures for ... refunds after appeals in which the defendant's conviction is reversed."); Cal. Penal Code § 1262 ("If a judgment against the defendant is reversed and the case is dismissed, or if the appellate court directs a final disposition of the action in defendant's favor, and defendant has theretofore paid a fine in the case, such act shall also be deemed an order of the court that the fine, including any penalty assessment thereon, be returned to defendant."); Del. Code tit. 11, § 4103(a) ("The State Treasurer shall remit to each person, or to the attorney of such person, who has paid a fine upon a conviction which was later set aside by a court of higher jurisdiction."); Tex. Code Crim. Proc. art. 103.008(a) ("On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending shall correct any error in the costs.").

In other jurisdictions, courts routinely refund monetary penalties when convictions are reversed. *See, e.g., Telink, Inc. v. United States*, 24 F.3d 42, 47 (9th Cir. 1994) ("If Telink and Burnup prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action and without regard to the limitations

period for civil actions."); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines. This it could do without requiring the bringing of another action."); *United States v. Beckner*, 16 F. Supp. 2d 677, 678-79 (M.D. La. 1998) (holding that when a conviction is reversed, federal courts have authority under the All Writs Act, 28 U.S.C. § 1651, to order the refund of restitution collected from the defendant and disbursed to victims); *United States v. Venneri*, 782 F. Supp. 1091, 1094-95 (D. Md. 1991) (same); *People v. Meyerowitz*, 335 N.E.2d 1, 7 (Ill. 1975) ("We hold that the defendants are entitled to a refund of the fines and costs they have paid as a result of their void convictions."); *Bogard v. State*, 450 S.W.3d 690, 692 (Ark. Ct. App. 2014) (after conviction reversed, directing that "any restitution already paid by Bogard to Whitwell be refunded"); *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Ct. App. 1980) (after conviction reversed, court should refund fine, restitution, and fees "as part of its inherent power to correct the effects of its own wrongdoing and restore the petitioner to the *status quo ante*"); *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012) (after conviction reversed, court has authority "to order the return of restitution erroneously paid").

Several courts have held, contrary to the view taken by the Colorado Supreme Court, that due process requires that defendants receive a refund of monetary penalties when their convictions are re-

versed. The case often cited as providing the clearest discussion of this issue is *United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973), in which the court observed:

> While there are no means available to compensate a person who has been imprisoned for violating a statute that is subsequently found constitutionally void and retrospectively applied, there is always a means for such a person to recoup his losses when the loss takes the form of a monetary fine. *The Fifth Amendment prohibition against the taking of one's property without due process demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law.* Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of the prosecution.

Id. at 836 (emphasis added).

With the exception of the Colorado Supreme Court, every other court to have addressed this question has agreed with *Lewis* that the Due Process Clause requires a refund of monetary penalties when a conviction is reversed. *See Ex parte McCurley*, 412 So. 2d 1236, 1237-38 (Ala. 1982) (quoting this passage from *Lewis* and requiring a refund of fines and costs when a conviction is reversed); *State v. Piekkola*, 241 N.W.2d 563, 565 (S.D. 1976) (quoting this passage from *Lewis* and concluding that failure to

refund the defendant's money "offends common sense and severely distorts the image of justice as fairness"), *overruled on other grounds, In re Estate of Erdmann*, 447 N.W.2d 356, 359 n.2 (S.D. 1989); *People v. Nance*, 542 N.W.2d 358, 359-60 (Mich. Ct. App. 1995) (quoting this passage from *Lewis* and requiring reimbursement of money paid as a result of the defendant's conviction).[11]

The traditional rule is so sensible and fair, and Colorado's scheme is so clearly inconsistent with due process, that no other state requires defendants to prove their innocence to get their money back when their convictions are reversed.

III. This pair of cases presents an ideal vehicle for addressing this important question.

This pair of cases has all the normal attributes of a good vehicle for addressing the question presented. The question was squarely decided below. Because there was a dissenting opinion, both sides of the question were aired at length. It is the only issue in both cases. There are no procedural or jurisdictional

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[11] In a few cases, courts have denied refunds where the person seeking the refund failed to serve the proper parties, *Hooper v. State*, 248 P.3d 748, 751 (Idaho 2011); *State v. Peterson*, 280 P.3d 184, 194 (Idaho Ct. App. 2012); *State v. Owens*, 118 Wash App. 1056, *3 (2003) (unpublished opinion); *State v. Sego*, 1995 WL 454020, *2 (Tenn. Ct. Crim. App. 1995) (unpublished opinion), and where the person seeking the refund obtained a benefit in exchange for the money, *State v. Parker*, 872 P.2d 1041, 1049 (Utah Ct. App. 1994) (Davis, J., stating the view of the majority on this issue, *see id.* at 1042). Neither of these circumstances is present in our case.

obstacles that could block the Court from reaching the merits. There can be no further percolation, because no other state has a scheme like Colorado's, and the Colorado Supreme Court has definitively spoken.

But this pair of cases also has an unusual feature that makes it an exceptionally good vehicle: the factual variations within and between the two cases. We think these factual variations are irrelevant. But we recognize that others may think differently. These variations will allow for a complete resolution of the question presented.

First, the cases involve two kinds of monetary penalties: fees kept by the state and restitution that has apparently already been disbursed to victims. In our view, due process requires both kinds of penalties to be refunded by the state to the defendant when a conviction is reversed. (Whether the state may then recoup these funds from the victims is an issue for the state and the victims; it has no bearing on the due process rights of the defendant.) But one court, the Ninth Circuit, has held that while the government must return fees, once restitution has been disbursed to victims the government no longer has any obligation to return it. *United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004). Our pair of cases will give the Court an opportunity to decide whether due process principles yield a different outcome for restitution than for fees.

Second, Shannon Nelson was acquitted after her conviction was reversed, while after Louis Madden's conviction was reversed the prosecutor simply

dropped the charges. We think this difference is also irrelevant; the important thing is that neither stands convicted. If the Court thinks differently, however, this pair of cases will allow for a distinction between the two circumstances.

Third, Shannon Nelson's convictions were reversed on direct appeal, while the last of Louis Madden's convictions was reversed on collateral review. Again, our view is that this difference should not matter, but if the Court's view is that it should, this pair of cases will allow the Court to make that distinction.

For these reasons, this pair of cases presents an ideal vehicle for determining whether, and under what circumstances, Colorado's idiosyncratic scheme is inconsistent with due process.

This is an important question. It arises virtually every time a conviction is reversed, because Colorado, like other states, imposes an array of monetary penalties on virtually everyone convicted of a crime. Moreover, if Colorado can get away with keeping its citizens' money when their convictions are reversed, other states may seek to do the same. This Court should make clear that due process requires a refund of monetary penalties when a conviction is reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court of Colorado

The PEOPLE of the State of Colorado, Petitioner
v.
Shannon NELSON, Respondent

Supreme Court Case No. 13SC495
December 21, 2015
Rehearing Denied February 8, 2016

CHIEF JUSTICE RICE delivered the Opinion of the Court.

¶ 1 This case requires us to decide whether Respondent Shannon Nelson may receive a refund of costs, fees, and restitution that she paid following a conviction. Nelson's conviction was overturned and she was acquitted after a new trial. We hold that a trial court may not authorize a refund of costs, fees, or restitution following a criminal trial without statutory authority. Because none of the statutes governing the fines, fees, and restitution empowered the trial court to issue a refund, it could not do so. Exonerated defendants may seek a refund of costs, fees, and restitution, but only through a separate civil proceeding, which Nelson did not pursue.

I. Facts and Procedural History

¶ 2 In 2006, Nelson was convicted of five charges relating to sexual assaults allegedly committed against her children. The trial court sentenced Nelson to prison for twenty years to life, and ordered

that she pay court costs, fees, and restitution. Specifically, the trial court ordered Nelson to pay the following costs and fees: (1) $125.00 to the victim compensation fund, (2) $162.50 to the victims and witnesses assistance and law enforcement fund (referred to as the "VAST fund" in the Register of Actions and this opinion), (3) $35.00 for court costs, and (4) a "time payment fee" of $25.00. She was also ordered to pay $7,845.00 in restitution, bringing the total owed to $8,192.50.

¶ 3 The court of appeals reversed the judgment against Nelson and remanded for a new trial based on the improper use of an unendorsed expert witness. *People v. Shannon Kay Gonser, n/k/a Shannon Nelson*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009). In the second trial, a new jury acquitted Nelson of the five charges.

¶ 4 Between Nelson's initial conviction and subsequent acquittal, the Department of Corrections withheld $702.10 from her inmate account to pay the costs, fees, and restitution that she owed.[1] Eight months after her acquittal, Nelson filed a motion for a refund of the money she had paid toward the costs, fees, and restitution, arguing that a failure to refund the money would violate state and federal constitutional guarantees of due process. The trial court concluded that it did not have authority to order the

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[1] Nelson states that the amount withheld was $681.35. The Register of Actions, however, shows that the total amount withheld was $702.10. The payments were applied as follows:

- $125.00 to the victim compensation fund;
- $162.50 to the VAST fund; and
- $414.60 to the victims as restitution.

Department of Corrections to return the funds. Nelson appealed.

¶ 5 The court of appeals reversed the trial court's decision. *People v. Nelson*, 2013 COA 58, ¶ 36, —— P.3d ——. It held that when a defendant's conviction is overturned on appeal and upon retrial she is acquitted, she is entitled to seek a refund of costs and fees, *id.* at ¶ 16, as well as a refund of restitution, *id.* at ¶ 21. The court of appeals concluded that an order for a defendant to pay costs, fees, and restitution must be tied to a valid conviction. *Id.* at ¶¶ 12–13. It then stated that Nelson's acquittal upon retrial rendered the prior conviction invalid. *Id.* at ¶¶ 14–16. The court of appeals reasoned that the parties should be "placed in status quo" and Nelson should receive a refund. *Id.* at ¶ 15 (quoting *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588, 593 (1961)). Finally, the court of appeals determined that the State should issue the refund, because the State's action caused the "wrongful payment of restitution." *Nelson*, ¶ 29. The court of appeals acknowledged that "the [S]tate may be required to refund monies that it has already disbursed to third parties," *id.* at ¶ 28, but determined that, by disbursing the funds, the State "assumed the risk that the conviction could ultimately be overturned," *id.* at ¶ 30.

¶ 6 The People then petitioned this court for certiorari, asking whether the trial court may order a refund of restitution and, if so, which branch of the government should shoulder that burden. We granted certiorari to consider whether a trial court could issue refunds of not only restitution, but also costs

and fees, and to determine which branch, if any, should pay the refunds.[2]

II. Standard of Review

¶ 7 Whether a trial court has authority to order a refund of costs, fees, and restitution presents a question of law, which we review de novo. *See People v. Porter*, 2015 CO 34, ¶ 8, 348 P.3d 922, 924. This case involves issues of statutory construction, which we also review de novo. *Mishkin v. Young*, 107 P.3d 393, 396 (Colo. 2005).

III. Analysis

¶ 8 We begin with an overview of the statutes governing the costs, fees, and restitution ordered in this case, then proceed to a discussion of whether a trial court may authorize a refund. We hold that a trial court must have statutory authority to order a refund from public funds. A defendant may seek a refund of costs, fees, and restitution through the refund process created by sections 13–65–101 to –103, C.R.S. (2015) ("the Exoneration Act" or "the Act"). A trial court may not, however, order a refund of costs,

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[2] Specifically, we granted certiorari to review the following issues:

1. Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him.

2. Where the court of appeals ordered the State to refund restitution, which branch of the government is responsible for the refund.

fees, and restitution as part of a criminal proceeding without statutory authority to do so.

A. Legal Background

¶ 9 Nelson seeks reimbursement of restitution, costs, and fees that she paid after her initial conviction. This raises questions about the interplay between numerous statutes that govern the imposition, collection, management, and distribution of costs, fees, and restitution. *See, e.g.*, §§ 13–32–105, 18–1.3–603, 24–4.2–104(1)(d), 24–4.1–119, C.R.S. (2015). A brief review of the relevant statutes is necessary to explain the relationship between them, and how they affect a court's ability to order a refund.

1. Costs, Fees, and Surcharges

¶ 10 When Nelson was convicted after the first trial, the court ordered her to pay several costs, fees, and surcharges, totaling $347.50. First, Nelson was ordered to pay $125.00 to the crime victim compensation fund. The court orders a defendant to pay this fine when a criminal action results in a conviction or deferred judgment. § 24–4.1–119. These fines go into the crime victim compensation fund housed in each judicial district. *Id.*; § 24–4.1–117(1), C.R.S. (2015). Other than a small portion allocated to the fund's administrative costs, money in the fund is to be used "solely for the compensation of victims." § 24–4.1–117(5). Nelson paid this fee.

¶ 11 Next, the court imposed a separate charge for the VAST fund. § 24–4.2–104(1)(d). The court administrator in each judicial district is responsible for the VAST fund in that district. § 24–4.2–104(1)(a)(I).

Fees supporting this fund are "levied on each criminal action resulting in a conviction or in a deferred judgment and sentence." §§ 24–4.1–119, 24–4.2–104. Nelson paid $162.50 to the VAST fund.

¶ 12 Nelson was also charged a docket fee of $35.00, which funds the judicial stabilization cash fund and the state commission on judicial performance cash fund. § 13–32–105. Nelson did not pay this docket fee.

¶ 13 Because Nelson was unable to pay the costs, fees, and restitution on the day that she was ordered to pay, she was charged a time payment fee of $25.00. § 16–11–101.6(1), C.R.S. (2015). This fee is charged each year that the amount owed is not fully paid. *Id.* Time payment fees fund the judicial collection enhancement fund, which is located in the state treasury. § 16–11–101.6(2). The General Assembly makes annual appropriations from the fund to cover "administrative and personnel costs incurred in collecting restitution, fines, costs, fees, and other monetary assessments." *Id.* Nelson did not pay the time payment fee.

¶ 14 Nelson began paying the fees according to a payment plan because she was not able to pay them when she was convicted. When a defendant pays according to a payment plan, the payments are credited in the following order: (1) crime victim compensation fund; (2) VAST fund; (3) restitution; (4) surcharges related to the address confidentiality program; (5) time payment fee; (6) late fees; and (7) any other fines, fees, or surcharges. § 16–18.5–110, C.R.S. (2015). However, the State pays the cost of

criminal cases when a defendant is acquitted or when the court determines that the defendant is unable to pay. § 16–18–101(1), C.R.S. (2015). Because Nelson paid only a portion of what she was originally ordered to pay, the money was credited only to the victim compensation fund, the VAST fund, and toward restitution.

2. Restitution

¶ 15 In addition to these costs and fees, the court ordered Nelson to pay $7,845.00 in restitution to the victims. When a court orders a conviction, it must consider ordering restitution for any victims. § 18–1.3–603. An order of restitution is a "final civil judgment in favor of the state and any victim." § 18–1.3–603(4)(a). Moreover, "any such judgment shall remain in force until the restitution is paid in full." *Id.*

¶ 16 Restitution becomes "due and payable at the time that the order of conviction is entered." § 16–18.5–104(1), C.R.S. (2015). If no victim suffered pecuniary loss, then the court does not order restitution. § 18–1.3–603(1)(d). The amount of restitution may be increased if the court learns of additional victims or losses. § 18–1.3–603(3). It may also be decreased, either with the consent of the prosecuting attorney and the victims or if the defendant otherwise compensates the victims. *Id.*

¶ 17 The goal of ordering restitution is partly to rehabilitate defendants and deter criminal activity and partly to make victims whole. § 18–1.3–601(1)(c)–(e), C.R.S. (2015). The restitution program

aims to fully compensate victims and to take the profit out of crime. § 18–1.3–601(1)(a)–(d); *People v. Leonard*, 167 P.3d 178, 181 (Colo. App. 2007) (citing *People v. Milne*, 690 P.2d 829, 836 (Colo. 1984)).

¶ 18 If the defendant claims she cannot pay the restitution amount and is incarcerated, then the Department of Corrections investigates the defendant's ability to pay and establishes a payment plan. § 16–18.5–106, C.R.S. (2015). While a defendant is incarcerated, the Department of Corrections "may direct that a portion of the deposits into such inmate's bank account be applied to any outstanding balance." § 16–18.5–106(2). If the defendant is not in custody and claims she cannot pay, she must report to the Collections Investigator, who investigates the defendant's ability to pay and establishes a payment schedule with the defendant. § 16–18.5–104(3)–(4). The Collections Investigator is responsible for monitoring the defendant's restitution payments. § 16–18.5–105, C.R.S. (2015).

¶ 19 Victims have the right to pursue collection of restitution. § 16–18.5–107(1), C.R.S. (2015). But if a victim elects not to pursue it, the Collections Investigator or Department of Corrections must do so. § 16–18.5–107(4). If "no victim can be reasonably located or the victim declines to accept restitution," the defendant pays the restitution amount to the State. § 16–18.5–109, C.R.S. (2015). Restitution paid to the State is transferred to the VAST fund in the judicial district where the crime occurred. § 24–4.1–117. The money is then distributed between the VAST fund and the crime victim compensation fund. § 16–18.5–109(3). Of the total amount that Nelson

paid, $414.60 was disbursed to the victims as restitution.

3. Crime Victim Compensation Act

¶ 20 The People suggest that if a court may order a refund of restitution, then the money should come from the crime victim compensation fund. However, an examination of the statutes governing the crime victim compensation fund reveals no authority by which the court could order a withdrawal from this fund to reimburse Nelson.

¶ 21 In 1981, the General Assembly created the Crime Victim Compensation Program to protect and assist the victims of crimes and their immediate family members by "lessening the financial burden placed upon victims due to the commission of crimes." § 24–4.1–101, C.R.S. (2015). The General Assembly instructed that the statute be "liberally construed" to accomplish its stated purpose. *Id.*

¶ 22 To achieve this purpose, the Crime Victim Compensation Act established a crime victim compensation board ("the board") in each judicial district. §§ 24–4.1–102(3), –103(1), C.R.S. (2015). In each district, the District Attorney appoints three members to the board. § 24–4.1–103(1). The District Attorney and her staff assist the board in performing its duties. § 24–4.1–104, C.R.S. (2015). This board considers applications to determine whether a victim is entitled to compensation and how much the victim should receive. §§ 24–4.1–106 to –109, C.R.S. (2015).

¶ 23 The Crime Victim Compensation Act also created a crime victim compensation fund in each

judicial district. § 24–4.1–117(1). This fund consists of the money received from costs and surcharges levied on criminal convictions, any federal money available for victim compensation, plus refunds from victims who receive an award from the fund in addition to damages or restitution from the defendant. § 24–4.1–117(2); *see also* § 24–4.1–119 (listing the costs and surcharges that finance the fund). The fees are "levied on each criminal action resulting in a conviction or in a deferred judgment and sentence." § 24–4.1–119(1)(a).

¶ 24 "All moneys deposited in the fund shall be used solely for the compensation of victims," other than a small carve-out of 12.5% for administrative costs. § 24–4.1–117(5). The District Attorney may use no more than 10% of the fund for administrative costs, and the Court Administrator may use 2.5% for costs. *Id.*

¶ 25 The Court Administrator in each judicial district is the custodian of the fund. § 24–4.1–118, C.R.S. (2015). The Court Administrator makes disbursements from the fund to compensate victims upon written authorization of either the board or the court. *Id.* Each year, the Court Administrators in each judicial district report the amount of money collected and distributed under the fund to the state Court Administrator. § 24–4.1–122, C.R.S. (2015).

¶ 26 The Crime Victim Compensation Act also created an advisory board, which functions under the Division of Criminal Justice in the Department of Public Safety. § 24–4.1–117.3(1), C.R.S. (2015). The Executive Director of the Department of Public

Safety sits on the board and appoints at least seventeen members of various backgrounds to the board. § 24–4.1–117.3(2). The advisory board develops and revises standards for the administration of the fund, investigates and imposes sanctions for violating those standards, distributes seized profits from crime, and advises the division of criminal justice concerning grant awards. § 24–4.1–117.3(3).

¶ 27 The fund is intended to be the payor of last resort. § 24–4.1–110(2), C.R.S. (2015). When a victim receives compensation from another source (such as restitution from the defendant), in addition to compensation from the fund, the victim must refund either the lesser sum or the amount of compensation that exceeds his losses. *Id.* Any payment that the victim receives from the fund may not be assigned or subject to attachment until after the victim or his beneficiary actually receives the payment. § 24–4.1–114, C.R.S. (2015). "The acceptance of an award ... shall subrogate the state, to the extent of such award, to any right or right of action accruing to the applicant." § 24–4.1–116, C.R.S. (2015).

¶ 28 The crime victim compensation fund's purpose is clear: the money is to be used to compensate crime victims. Several bodies—including the board, the advisory board, and the court administrators—exercise some control over the fund. All of these bodies, however, are governed by the same restriction. Other than a small amount dedicated to administrative costs, the fund is to be used "*solely* for the compensation of victims." § 24–4.1–117(5) (emphasis added). Nothing in the statute authorizes the court to withdraw funds for a refund to the defendant.

4. The Exoneration Act

¶ 29 The Exoneration Act authorizes a court to issue refunds to exonerated defendants, but, because Nelson did not file a claim under the Act, it does not apply to this case.[3] *See* §§ 13–65–101 to –103. In 2013, the General Assembly enacted the Exoneration Act, which created a civil claim for relief for exonerated persons who had been convicted of a felony and sentenced to a term of incarceration. § 13–65–102(1). This statute aims to compensate an innocent person who was wrongly convicted. Ch. 409, sec. 1, 2013 Colo. Sess. Laws 2412, 2412. The Act outlines a process for exonerated defendants to seek a refund of fines, penalties, costs, and restitution, along with additional compensation. §§ 13–65–101 to –103.

¶ 30 To receive compensation under the Act, the exonerated person must prove, by clear and convincing evidence, that she was "actually innocent." §§ 13–65–101(1)(a); 13–65–102(1)(a). To be considered actually innocent under the Act, the exonerated person must show either that her conviction was the result of a miscarriage of justice or that she is factually innocent. § 13–65–101(1)(a)(I)–(II). Insufficiency of

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[3] The Exoneration Act was not passed until 2013, after Nelson made her initial motion requesting a refund. However, the Act allowed defendants to seek relief, even if they met the criteria prior to the Act's passage, as long as they acted before June 5, 2015. § 13–65–102(1)(b)(II), C.R.S. (2015). Nelson did not seek a refund through procedures created by the Act in the allotted two-year time frame. Therefore, whether she met the other criteria that the Act demands, such as actual innocence, is not before us.

the evidence or a legal error unrelated to the person's actual innocence cannot support either exoneration or subsequent compensation under the Act. §§ 13–65–101(1)(b); 13–65–102(2)(a)(I)–(II).

¶ 31 If a person is exonerated, she is entitled to compensation for her wrongful conviction and sentence. § 13–65–103(1). If a district court finds that the exonerated person is eligible for compensation, it directs the Court administrator to compensate her. *Id.* The General Assembly funds the Act through a general-fund appropriation, which is allocated to the judicial department. *See* Ch. 409, sec. 2, 2014 Colo. Sess. Laws. 2381, 2510.

¶ 32 Compensation from the State may include $70,000.00 per year of incarceration, tuition waivers, and reasonable attorney fees for bringing a claim under the Act. § 13–65–103. The Act also contemplates a refund of all costs and fees that the exonerated person was required to pay as a result of the wrongful conviction. § 13–65–103(2)(e)(V) (stating that an exonerated person may be refunded "[t]he amount any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication").

¶ 33 Nelson did not seek a refund through this process. She filed a motion for a refund several months after her acquittal, in connection with her criminal trial. Nelson asks this court to determine whether she may seek a refund of costs, fees, and restitution as part of a criminal trial after an initial

conviction has been overturned, apart from the process that exists under the Exoneration Act.

B. Statutory Authority for Refunds from Public Funds

¶ 34 The General Assembly authorizes the collection, management, and distribution of the funds raised by costs, fees, and restitution pursuant to its power to define crimes and sentences, raise revenue, and make appropriations. These powers are inherently legislative, and a court may not intrude on the General Assembly's power by authorizing a refund from public funds without statutory authority to do so. *See* Colo. Const. art III; *People v. Dist. Court, City & Cty. of Denver*, 808 P.2d 831, 835 (Colo. 1991). The Exoneration Act provides the sole statutory authority for the court to issue a refund to criminal defendants after their convictions are overturned. *See* §§ 13–65–101 to –103.

¶ 35 As a threshold matter, the court had clear authority to impose, collect, and disburse the costs, fees, and restitution. First, the court correctly ordered—and the Department of Corrections correctly withheld—money from Nelson based on her initial conviction. The General Assembly instructed the court to impose costs, fees, and restitution pursuant to its power to define crimes and prescribe punishments. *See Martinez v. People*, 69 P.3d 1029, 1031 (Colo. 2003). Courts order defendants to pay costs, fees, and restitution that are tied to criminal convictions—but only to the extent permitted by statute. *See id.*; *see also, e.g.*, §§ 24–4.1–119, 24–4.2–104(1)(d), 13–32–105, 18–1.3–603. The General As-

sembly prescribes the punishments for crimes and, in doing so, limits the court's sentencing authority. *People v. Oglethorpe*, 87 P.3d 129, 136 (Colo. App. 2003), *as modified on denial of reh'g* (Aug. 14, 2003). Once the court imposes the sentence, the executive branch carries it out. *Id.*; *see* § 16–18.5–106 (authorizing the Department of Corrections to take money from an inmate's account to pay outstanding fees).

¶ 36 In Nelson's case, the court ordered Nelson to pay numerous costs and fees that were each mandated by statute. *See, e.g.*, §§ 24–4.1–119, 24–4.2–104. The statutes instruct that the charges must be levied when a case results in a conviction, and that the defendant must pay the charges. *See, e.g.*, §§ 24–4.1–119, 24–4.2–104. The court must carry out the statutes' instructions. *See Oglethorpe*, 87 P.3d at 136. The court must impose the fees when a conviction occurs and must also use the funds as the statutes instruct. Therefore, the trial court properly ordered Nelson to pay costs, fees, and restitution pursuant to valid statutes.

¶ 37 Next, after collecting fines, fees, and restitution, the court correctly distributed the funds to victims and public funds, as ordered by the statutes. *See, e.g.*, §§ 18–1.3–601, 24–4.1–117, 24–4.2–104. The General Assembly directs when these fees may be collected and how the money may be used based on its power to raise revenue and appropriate funds. *See* Colo. Const. art. V, §§ 31–32. This power "is plenary, subject only to constitutional limitations." *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1380 (Colo. 1985). The General Assembly must raise revenue to create a source of funding for its appropriations to

cover the expenses of the executive, legislative, and judicial departments. *Id.* at 1380–81 (citing Colo. Const. art. V, §§ 31–32).

¶ 38 Because the General Assembly must be able to plan and budget to fulfill its duties, Colorado's constitution protects its control over public money. Colo. Const. art. V, § 33. "No moneys in the state treasury shall be disbursed ... except upon appropriations made by law, or otherwise authorized by law." *Id.* The General Assembly must be able to plan and monitor public money so that sufficient funds are available to support appropriations. *Lamm*, 704 P.2d at 1381. We have held that the ability to specify which funds support which appropriations, and to make appropriations contingent on the availability of money in those funds, is "essential to the legislative power." *Id.*

¶ 39 In this case, $414.60 was distributed to victims and $347.50 was placed into public funds, according to the statutes governing each fee. A court does not "assume the risk" that a conviction will be overturned by following these statutory commands. *Contra Nelson*, ¶ 30. Rather, when the court orders a convicted defendant to pay costs, fees, and restitution—pursuant to statutory commands—the court must also follow the statutes' instructions on how that money may be used. For example, the court was required to distribute the money that Nelson paid toward restitution to the victims. *See* § 18–1.3–601. Similarly, the court was required to disburse the money collected from costs and fees into public funds. *See, e.g.*, §§ 24–4.1–117(2), 24–4.1–119(1)(a); *see also* § 16–18.5–109(3) (directing that restitution

money be placed in the VAST and crime victim compensation funds when a victim declines to accept restitution or no victim can be reasonably found). The court correctly disbursed the costs, fees, and restitution that Nelson paid to either the victims or public funds, according to the governing statutes.

¶ 40 Just as the court must follow statutory commands in imposing and disbursing fees, the court may authorize refunds from public funds only pursuant to statutory authority.[4] *See People v. $11,200.00 U.S. Currency*, 2013 CO 64, ¶ 4, 313 P.3d 554, 555–56 (holding that the trial court lacked authority to order a refund where the defendant's case did not meet the specific statutory requirements authorizing a refund). The court may not intrude on the legislature's powers by authorizing refunds from public funds. *See* Colo. Const. art. III (stating that each branch of government may not intrude on another's powers absent express constitutional permission); *cf. Lamm*, 704 P.2d at 1385 (avoiding "the impermissible positive effect" of the executive branch

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[4] Once the state disburses restitution to the victims, the state no longer controls that money. *See* § 18–1.3–601. Neither the defendant nor the court may seek a refund of restitution from the victims. *See* § 13–65–103(2)(e)(V); *see also* § 24–4.1–302.5(1)(a), C.R.S. (2015) (affirming victims' right to be free from harassment). Even when a defendant is exonerated after a finding of actual innocence, victims are not required to reimburse the defendant for any restitution payments they received. § 13–65–103(2)(e)(V) (emphasizing that allowing a refund of restitution to an exonerated defendant "shall not be interpreted to require the reimbursement of restitution payments by" a victim). As a result, any potential refund of restitution could come only from a public fund.

forcing funding to come from otherwise-appropriated funds, which would invade the legislature's appropriation power). A court order awarding money "payable from public funds implicates sensitive budget and funding considerations, and authority to intrude into these areas is not to be lightly implied." *Dist. Court, City & Cty. of Denver*, 808 P.2d at 835. For this reason, we have held that "a monetary sanction payable from public funds ... is beyond the authority of the trial court." *Id.*

¶ 41 If the court were to refund Nelson's costs and fees, the refund would draw on public funds, thereby affecting appropriations from that fund. The refund would diminish those public funds and disregard the legislature's directives on how that money is to be spent or appropriated. This would impermissibly intrude on the legislature's power and hamstring its ability to fulfill its responsibility to raise and appropriate funds. Therefore, a court must have statutory authority to authorize a refund from public funds, and it did not in this case.

¶ 42 Finally, we turn to the possible statutory authority that might permit a court to order a refund. Nelson argues that the statutes governing costs, fees, and restitution provide statutory authority to support refunds. Nelson argues that, because the orders to pay costs, fees, and restitution must all be tied to a conviction, her acquittal renders the initial conviction invalid, and the money must be returned. This argument fails for two reasons. First, the court and the Department of Corrections followed the instructions laid out in the statutes governing costs and fees. The court correctly withheld money from

Nelson as part of her initial conviction: the fines were tied to a conviction. Furthermore, Nelson was required to make payments toward the costs, fees, and restitution she owed only while her conviction stood. The costs, fees, and restitution were therefore imposed based on a conviction, and the obligation to pay ceased when the conviction was no longer in place. The statutes authorized the imposition and collection of fees but did not address the possibility of a refund.

¶ 43 Second, the Exoneration Act provides the proper procedure for seeking a refund. When examining the relationship between statutory provisions, "a special or specific statutory provision prevails over a general provision." *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168, 1174 (Colo. 1991) (citing § 2–4–205, 1B C.R.S. (1980) (now codified at § 2–4–205, C.R.S. (2015))). We also presume that the legislature is aware of its prior enactments when it passes new legislation. *A.S. v. People*, 2013 CO 63, ¶ 11, 312 P.3d 168, 171.

¶ 44 None of the statutes governing costs, fees, and restitution address whether a court may withdraw money from public funds to refund money that a defendant has already paid. *See, e.g.*, §§ 18–1.3–603, 24–4.1–117, 24–4.1–119. On the other hand, the Exoneration Act specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution. § 13–65–103(2)(e)(V). When creating a refund procedure for exonerated defendants, the General Assembly did not amend the existing statutes to create alternative means for defendants to seek a refund. The Exonera-

tion Act created an exclusive process for exonerated defendants seeking a refund of costs, fees, and restitution.

¶ 45 Therefore, when a defendant's conviction is overturned and she is acquitted after a new trial, the trial court may authorize a refund of costs, fees, and restitution only pursuant to the process created in the Exoneration Act. Accordingly, the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution based on her motion following her criminal trial.

C. No Due Process Violation

¶ 46 In her motion requesting a refund, Nelson argued that, upon her acquittal, due process required an automatic refund of costs and fees that she had paid. Nelson argues that the money was wrongfully withheld and that the interests of justice require a refund of the costs and fees she paid because her conviction was overturned.[5] We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted. The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction.

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[5] Nelson relies on *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588, 593 (1961), to suggest that parties must be placed in the "*status quo*" after a conviction is reversed. However, *Toland* does not apply here. Unlike Nelson, the defendant in *Toland* was subject to a "hasty, ill considered, dark of night disposition" of his case, which was "not an acceptable substitute for a trial." *Id.* at 593.

¶ 47 No person shall be denied property without due process of law. U.S. Const. amend. V; *id.* amend. XIV § 1; Colo. Const. art. II, § 25. "Due process requires, at a minimum, notice and the opportunity for a meaningful hearing before an impartial tribunal." *Van Sickle v. Boyes*, 797 P.2d 1267, 1273–74 (Colo. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 348–49, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). When a criminal defendant is convicted, the court must order defendants to pay certain costs. *See supra* ¶¶ 10–14; *see, e.g.*, § 24–4.1–119(1)(a) (crime victim compensation fund); § 13–32–105 (docket fees). If a defendant is acquitted, however, section 16–18–101(1) requires the State to pay the court costs.

¶ 48 In this case, the money was not wrongfully withheld because a conviction supported the imposition of costs, fees, and restitution. *See supra* ¶¶10–14; *see also, e.g.*, § 16–18.5–104 (stating that restitution becomes "due and payable at the time that the order of conviction is entered"). Nelson was initially convicted after a jury trial, so the court was authorized to order Nelson to pay costs, fees, and restitution at that time. Nelson was not ordered to pay costs and fees for the second trial, when she was acquitted. *See* § 16–18–101(1). Nelson was obligated to pay only while her conviction was in place and this obligation was imposed pursuant to a valid statute. Accordingly, she was not deprived of due process.

¶ 49 Moreover, as explained, the General Assembly has provided a process for defendants to seek refunds. *See* §§ 13–65–101 to –103. Nelson did not file an action under the Exoneration Act, which allows a court to grant refunds of fees and restitution, along

with compensation for the time an exonerated defendant spent incarcerated. *See* §§ 13–65–101 to –103. Due process does not require a defendant to be compensated automatically for the time she spent incarcerated while seeking an appeal or new trial. Similarly, due process does not require an automatic refund of fines paid in connection with a conviction during that time.

¶ 50 The Exoneration Act provides sufficient process for defendants to seek a refund of costs, fees, and restitution that they incurred while a conviction was in place. Therefore, requiring a defendant to seek a refund of costs, fees, and restitution through the process created by the legislature, rather than upon a motion after a criminal trial, does not violate due process.

IV. Conclusion

¶ 51 The trial court did not have the authority to grant a refund of costs, fees, and restitution to Nelson. If a criminal defendant wishes to seek a refund, the Exoneration Act provides the only procedure to do so. Accordingly, we reverse the court of appeals' ruling and remand the case for proceedings consistent with this opinion.

JUSTICE HOOD dissents.

JUSTICE GABRIEL does not participate.

JUSTICE HOOD, dissenting.

¶ 1 The majority concludes the State may deprive a person of her property as a result of a criminal conviction and that it may retain the property even

after the person shows on appeal that the conviction is invalid. It finds that, while the legislature has provided for the collection and expenditure of a convicted defendant's money, the legislature has not provided for refunds and therefore criminal courts lack authority to issue refunds. To obtain relief, the majority requires Shannon Nelson to mount a new lawsuit and prove her innocence under the Compensation for Certain Exonerated Persons Act ("Exoneration Act" or "Act").

¶ 2 Because Nelson is legally innocent, I would begin at a different place. Instead of requiring Nelson to identify a specific statute authorizing a refund, I would require the State to identify a source of law allowing it to keep a defendant's property in the absence of a valid criminal conviction. Because I know of no such authority, and I agree with the court of appeals that the district court had jurisdiction to order a refund, I respectfully dissent.

I. Nelson Has Never Been Validly Convicted.

¶ 3 The majority quickly moves over the procedural history of Nelson's case, but it is worth a closer look. In 2006, Nelson stood trial for crimes of sexual abuse allegedly perpetrated against her four children. The prosecution's case depended heavily on the children's testimony and out-of-court statements. At trial, the People called as a witness a forensic interviewer who had spoken with the children. When the People posed a question about the nature of children's memories, Nelson objected because the witness had not been endorsed as an expert. The trial court acknowledged the witness was not qualified as

an expert and that in the past it had been "reluctant" to qualify her, but the court felt that based on the interviewer's continuing training and growing experience she would "at some point in the future ... be qualifiable as an expert." The court overruled Nelson's objection. The interviewer went on to testify about the age at which children have the ability to remember information and relate it accurately; she also described the ways children disclose trauma and the reliability of such disclosures. The jury convicted Nelson of five charges—sexual assault on a child, aggravated incest, and three counts of misdemeanor child abuse. She appealed.

¶ 4 The court of appeals reversed her convictions in a unanimous opinion. *People v. Shannon Kay Gonser, n/k/a Shannon Nelson*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009). The division concluded the trial court erred by allowing a lay witness to testify on matters requiring specialized knowledge and training. It further concluded this error was prejudicial. The error impaired the fairness of Nelson's trial by affecting the jury's ability to evaluate the credibility of the alleged victims. Consequently, the court reversed her convictions and remanded for a new trial.

¶ 5 The prosecution retried Nelson. A jury acquitted her.

¶ 6 Because Nelson was never validly convicted, we presume she is innocent. This, of course, is one of our bedrock concepts of criminal justice. *See Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) ("[The presumption of innocence] is

the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). Thus, just as the State was required to release Nelson from incarceration, it should also be required to release Nelson's money paid as costs, fees, and restitution.

II. The State's Appellate Process Must Comport with Due Process.

¶ 7 This case stands at the confluence of the legislature's choice to provide appellate review of convictions and its choice to collect money from defendants before convictions are final. Though the Supreme Court has said the federal Constitution guarantees no right to an appeal, *see McKane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894), when the legislature creates one, as Colorado has done, *see* § 16–12–101, C.R.S. (2015), a criminal defendant is entitled to due process throughout the appeal. *Hoang v. People*, 2014 CO 27, ¶ 39, 323 P.3d 780, 788; *see also, e.g., Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (holding that when a state provides a first appeal as of right, due process requires that defendants receive the effective assistance of counsel during that appeal). Knowing this, the legislature might have decided not to order defendants to pay costs, fees, and restitution until judgments survive direct appeal. While requiring defendants to pay up sooner is understandable, I struggle to see how we can sanction a system that makes money immediately due without providing for its return when reversible error occurs.

¶ 8 Like the majority, I see nothing wrong with a court following the statutory plan for the collection and use of a convicted defendant's funds, *see* maj. op. ¶ 39; nor is there anything objectionable about requiring defendants to comply with existing court orders to pay costs, fees, and restitution stemming from valid convictions and requiring defendants who wish to challenge their convictions to use the normal channels. But when the process leading to the conviction is exposed as so deficient as to mandate reversal, "due" process should also allow for the return of a defendant's money.

¶ 9 This court shared my concern in *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588, 593 (1961), when we required the return of a defendant's fines and costs paid pursuant to a conviction obtained in violation of due process. Today, the majority relegates *Toland* to a footnote and emphasizes that the defendant there suffered a summary disposition of his case immediately after arrest—a situation that presented obvious due process problems. *See* maj. op. ¶ 46, n.5; *Toland*, 364 P.2d at 593 (concluding the "summary, hasty, middle of the night justice" dispensed to a suspected drunk driver after a crash did not comport with due process). By distinguishing *Toland*, the majority sets up two tiers of invalid convictions: There are stark constitutional violations, like those in *Toland*, that demand setting the defendant back to the status quo ante, and then there are arguably less egregious but nonetheless invalid convictions, like Nelson's, for which reimbursement is unavailable. But reversal is reversal. And an invalid conviction is no conviction at all.

¶ 10 Other courts have recognized what the interests of justice compel in similar circumstances. *See United States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir. 2004) (holding that, where the defendant's conviction was reversed on collateral review, the government must return amounts paid as special assessments and costs, though it need not reimburse for restitution disbursed after the conviction became final); *Telink, Inc. v. United States*, 24 F.3d 42, 47 (9th Cir. 1994) ("If [the defendants] prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action...."); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines."); *United States v. Beckner*, 16 F. Supp. 2d 677, 679 (M.D. La. 1998) ("[T]his court has jurisdiction to carry out its obligation to completely vacate all aspects of the erroneous judgement [sic] issued by it.... In this criminal case the final judgment is that Beckner owed restitution to no one.... The government must reimburse Beckner...."); *United States v. Venneri*, 782 F. Supp. 1091, 1092–95 (D. Md.1991) (describing previous order requiring government to refund a defendant's fine paid for violating an unconstitutional statute and ordering third-party restitution recipient to repay defendant); *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Dist. Ct. App.1980) (holding lower court had inherent power to restore defendant to status quo ante for wrongly paid fine, restitution, and probation costs); *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012) (finding trial court had ju-

risdiction to consider defendant's refund petition after his convictions were overturned on direct appeal). *But see Hooper v. State*, 150 Idaho 497, 248 P.3d 748, 751 (2011) (holding that the trial court could not award a refund of restitution where the defendant's payments had gone to the state's Industrial Commission over which the court lacked personal jurisdiction).

¶ 11 The majority finds no due process problem and refers Nelson to the Exoneration Act. *See* maj. op. ¶¶ 29–33, 46–50 (discussing §§ 13–65–101 to –103, C.R.S. (2015)). It proceeds as though litigants merely needed directions on where to ask for relief. *See id.* at ¶33 (explaining that Nelson filed a motion in criminal court instead of filing a civil claim). But the Exoneration Act is not the answer to Nelson's problem.

III. The Exoneration Act Is an Inadequate Remedy.

¶ 12 The Act is not up to the task the majority assigns it for several reasons. First and foremost, requiring defendants who have never been validly convicted to resort to this Act flips the presumption of innocence. The Act establishes a separate civil claim that puts the burden on the petitioner to demonstrate her actual innocence by clear and convincing evidence. § 13–65–102(4)(a)(I), (6)(b).

¶ 13 Second, the Act is not geared toward refunds. As the majority explains, the Exoneration Act provides not just a refund but also $70,000 for every year of wrongful incarceration, plus attorneys' fees

and other benefits. *See* maj. op. ¶ 32; *see also* § 13–65–103(2)–(3). The legislature is free to establish this broad relief and to require a petitioner to prove she is entitled to it. But Nelson is not seeking such broad relief; she is merely asking for a return to the status quo ante.[1] *See Toland*, 364 P.2d at 593.

¶ 14 Third, the majority ignores the impracticability of bringing a separate civil action. Defendants are not entitled to state-provided counsel in this context, which means they must retain a lawyer or find one willing to work for free. Defendants with meritorious claims paying hourly rates could find themselves throwing good money after bad, while the relatively low amounts available will likely prevent most defendants from retaining counsel on a contingency basis.

¶ 15 Therefore, I respectfully disagree with the majority's determination that the Exoneration Act provides "sufficient process" for defendants in Nelson's situation. Maj. op. ¶ 46. The Act serves different goals and provides a different remedy. Of course, this begs the question whether the judiciary has the authority to provide an alternative remedy.

IV. The Criminal Court May Award a Refund.

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[1] The Exoneration Act provides Nelson no recourse whatsoever for the money withheld due to her invalid misdemeanor convictions. Though misdemeanor convictions can subject individuals to various costs, *see, e.g.*, § 24–4.1–119(1)(a), C.R.S. (2015) (imposing $78 charge for a misdemeanor conviction), and restitution, *see* § 18–1.3–603(1), C.R.S. (2015), the Exoneration Act grants relief only to "a person who has been convicted of a *felony*," § 13–65–102(1)(a) (emphasis added).

¶ 16 Ancillary jurisdiction gives us that authority. In a well-reasoned and unanimous opinion, authored by then-Judge Gabriel, the court of appeals relied on the ancillary jurisdiction analysis articulated in *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969), and previously used by the court of appeals in *People v. Hargrave*, 179 P.3d 226, 229–30 (Colo. App. 2007). *See People v. Nelson*, 2013 COA 58, ¶¶ 24–26, —— P.3d ——.

¶ 17 Ancillary jurisdiction allows a court to decide certain matters related to the principal proceeding. "[A]ll courts, absent some specific statutory denial of power, possess ancillary powers to effectuate their jurisdiction." *Morrow*, 417 F.2d at 737. At issue in *Morrow* was whether a criminal court could issue an order preventing the dissemination of a defendant's arrest record after the case stemming from his arrest was dismissed. The United States Court of Appeals for the District of Columbia Circuit held the city's criminal court did have such ancillary jurisdiction. *Id.* at 740–41. "The major purpose of ancillary jurisdiction ... is to insure that a judgment of a court is given full effect; ancillary orders will issue when a party's actions, either directly or indirectly, threaten to compromise the effect of the court's judgment." *Id.* at 740.

¶ 18 Applying the test articulated in *Morrow*, *see id.* the court of appeals concluded the trial court had ancillary jurisdiction over Nelson's refund petition: The refund matter arose from the same transaction as the main proceeding (Nelson's criminal case); deciding the refund question did not require substantial new factfinding; nor would adjudication deprive

a party of a substantial procedural or substantive right; and finally, resolution of the ancillary matter was required to prevent frustration of the underlying criminal matter. *Nelson*, ¶ 25 (citing *Hargrave*, 179 P.3d at 229–30).

¶ 19 The court of appeals justifiably noted this approach also (1) serves judicial economy by preempting the need for defendants to file a separate civil action, *see id.* at ¶¶ 23, 26; *see also Morrow*, 417 F.2d at 740 (citing judicial economy as another purpose of ancillary jurisdiction); and (2) avoids "a scenario in which former criminal defendants are left to seek out and file lawsuits or other proceedings against third parties, and especially crime victims, to recover the restitution amounts that the defendants previously paid," *Nelson*, ¶ 31.

¶ 20 The majority raises another jurisdictional concern with this approach, one implicating the separation of powers. *See* maj. op. ¶ 34. Apart from a court's ability to hear a defendant's request for a refund, the majority argues courts cannot award a refund of costs, fees, and restitution in the absence of statutory authorization. *See id.* at ¶40. To grant a refund without statutory backing would be, in the majority's view, to "intrude on the General Assembly's power" to define crimes and sentences, raise revenue, and make appropriations. *Id.* at ¶34. These powers are undeniably important and they undoubtedly reside in the legislature, but they are nevertheless subject to constitutional constraints such as due process. *See* Colo. Const. art. II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law.").

¶ 21 Refunds simply recognize that the legislature lacks power to punish people who have not been validly convicted. They do not intrude on the power to define crimes and sentences.

¶ 22 As for the budgetary powers, the legislature itself recognizes the State's obligation to provide the court system with the resources it needs to function: Section 13–3–104—"State shall fund courts"—provides, "The state of Colorado shall provide funds by annual appropriation for the operations, salaries, and other expenses of all courts of record within the state...." § 13–3–104(1), C.R.S. (2015). As I see it, the obligation to refund money taken from defendants whom the State never validly convicted is part of the "operations" of courts; it is the cost of doing business, or here, an expense of doing justice.

¶ 23 Despite this, the majority argues that our precedent prohibits a court from ordering a refund absent more specific statutory authority. Our cases do not stand for such a broad principle. The majority leads with *People v. $11,200.00 U.S. Currency*, 2013 CO 64, 313 P.3d 554, where a defendant sought a refund of money lost through civil forfeiture. He relied on a particular statute that provided for the return of property only where the related criminal action terminated in an acquittal or dismissal while the forfeiture action was pending. *See id.* at ¶¶ 4, 13, 313 P.3d at 555–56, 558 (discussing § 16–13–307(1.6), C.R.S. (2013)). The defendant's forfeiture action, which we repeatedly stressed he never bothered to appeal, *see id.* at ¶¶ 3, 8, 28, 313 P.3d at 555–57, 561, became final long before his conviction was reversed on appeal, *see id.* at ¶¶ 5–10, 313 P.3d at

556–57. Thus, in that situation, that statute did not cover that defendant. Here, by contrast, Nelson seeks relief from the invalid criminal convictions themselves; she appealed those convictions and won. And while the restitution obligation is an independent civil judgment, *see* § 18–1.3–603(4)(a), C.R.S. (2015), it is tethered to the criminal conviction, *see* § 18–1.3–603(1) ("Every order of conviction ... shall include consideration of restitution."). Indeed, restitution is punishment for the crime. *See* § 18–1.3–601(1)(b)–(d) (setting forth "moral," rehabilitative, and deterrence rationales).

¶ 24 The majority also relies on *People v. District Court*, 808 P.2d 831, 835 (Colo. 1991), where we merely held that a trial court's remedial authority under Crim. P. 16 does not include the power to order the prosecution to pay the defendant's attorneys' fees. But a trial court's power to redress discovery abuses does not address our issue here: Whether the criminal court can refund costs, fees, and restitution to a defendant who was not validly convicted. Moreover, even if the case stood for the broad proposition the majority cites—"a monetary sanction payable from public funds ... is beyond the authority of the trial court," maj. op. ¶ 40 (omission in original) (quoting *Dist. Court*, 808 P.2d at 835)—a refund is not a "sanction" against the government; it is the return of a defendant's money.

¶ 25 Thus, our cases do not hold that the State may retain a defendant's funds after she demonstrates her conviction is invalid. In fact, our closest case says just the opposite. *See Toland*, 364 P.2d at 593.

¶ 26 Furthermore, the majority concedes that Nelson's repayment obligation "ceased when the conviction was no longer in place." Maj. op. ¶ 42; *see also id.* at ¶48 ("Nelson was obligated to pay only while her conviction was in place...."). Thus, the majority allows a court to grant a defendant prospective relief from an outstanding financial obligation that traces to an invalid conviction. This means the majority allows a court to cut off the flow of funds to victims and the State, but forbids a court-ordered refund. Yet the same reasoning compels relief in both directions: The defendant was not validly convicted.

¶ 27 The majority's budgetary concerns should also be tempered by the reality that many defendants are indigent and most convictions are affirmed. In fiscal year 2014, the court of appeals outright reversed on direct appeal in only 45 criminal cases, and, dating back to 2005, the annual number was never more than 67 (fiscal year 2008).[2] Even these numbers somewhat overstate the matter. The relevant number is the number of cases where, after reversal, the defendant was acquitted or never retried. And from within this group, only the defendants who paid something in the interim are affected. Nelson paid barely more than $700 while subject to her invalid convictions. While from the perspective of the State's total budget these sums are small, the underlying due process principle is large.

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[2] Data obtained from the Clerk of the Colorado Supreme Court and the Colorado Court of Appeals.

¶ 28 The legislature's choice to provide appellate review of convictions, when met with its choice to collect money from defendants before those convictions become final, implicates difficult public policy questions. Given the logistical complexities, the court of appeals was right to invite legislative participation. *See Nelson*, ¶ 34. But unlike the majority, I would require the legislature to confront those challenges. The legislature may decide for itself how to provide refunds, but I would not allow the State to retain a defendant's money on the basis of a conviction known to be invalid.

¶ 29 I conclude that the State was not authorized to retain Nelson's money. The district court had jurisdiction to order a refund. Therefore, I respectfully dissent.

APPENDIX B

Supreme Court of Colorado

The PEOPLE of the State of Colorado, Petitioner,
v.
Louis Alonzo MADDEN, Respondent.

Supreme Court Case No. 13SC496
December 21, 2015
Rehearing Denied February 8, 2016

CHIEF JUSTICE RICE delivered the Opinion of the Court.

¶ 1 This case requires us to decide whether the trial court had authority to refund costs, fees, and restitution that Respondent Louis Alonzo Madden had paid following his conviction. Madden's conviction was vacated and the prosecution elected not to retry him. None of the statutes governing the costs, fees, and restitution that Madden was ordered to pay address whether the court may draw on those funds. Similarly, procedural rules for defendants seeking post-conviction relief do not address whether a court may order refunds from public funds. Madden did not pursue a refund through the procedures defined in the Exoneration Act, which provides statutory authority for a trial court to issue a refund. Therefore, the trial court did not have statutory authority to order a refund from public funds in this case.

I. Facts and Procedural History

¶ 2 In 2005, Madden was convicted of attempting to patronize a prostituted child and attempted third degree sexual assault by force. See §§ 18–2–101, 18–7–406(1), C.R.S. (2015); 18–3–404, C.R.S. (1999). Madden was originally sentenced to an indeterminate sentence and was ordered to pay costs, fees, and restitution. Specifically, the trial court ordered Madden to pay the following costs and fees: (1) $125.00 to the victim compensation fund, (2) $125.00 to the victims and witnesses assistance and law enforcement fund (referred to as the "VAST" fund in the Register of Actions and this opinion), (3) $30.00 for court costs, (4) $45.00 for a drug standardized assessment, (5) $25.00 for drug testing, (6) $1,000.00 for a special advocate surcharge, (7) $2,000.00 for a sex offender surcharge, (8) $128.00 to the sex offender identification fund, and (9) a "time payment fee" of $25.00. He was also ordered to pay $910.00 in restitution, bringing the total owed to $4,413.00.

¶ 3 On appeal, we reviewed Madden's case and reversed his conviction of attempting to patronize a prostituted child, leaving only his attempted sexual assault conviction intact. *People v. Madden*, 111 P.3d 452, 460 (Colo. 2005). We remanded to the court of appeals, which then returned the case to the trial court with instructions to impose a determinate sentence. *People v. Madden*, No. 02CA0024, slip op. at 4, 2005 WL 1692643 (Colo. App. July 21, 2005). The trial court sentenced Madden to prison for three years, with credit for time served.

¶ 4 Madden then filed a pro se motion under Crim. P. 35(c), alleging ineffective assistance of trial counsel. The trial court appointed counsel and, after

an evidentiary hearing, granted the motion and vacated Madden's conviction. The prosecution elected not to appeal the order or retry the case. Shortly thereafter, Madden requested that he no longer be required to register as a sex offender and that the court refund the costs, fees, and restitution that he had paid. Madden had paid $1,220.00 toward the costs and fees and $757.75 in restitution, for a total of $1,977.75. The trial court determined that the amount that Madden had paid toward costs and fees should be returned, so Madden received a $1,220.00 refund. The restitution money, however, had been paid to the counseling service that the victim used and could not be returned. The trial court reasoned that the counseling service could sue the victim to recover that money, and the victim should not be required to return the restitution money. Madden appealed.

¶ 5 The court of appeals reversed the trial court's decision, holding that Madden was "entitled to a refund of the restitution that he paid in connection with his vacated conviction and that he may seek such a refund from the state in the context of this case." *People v. Madden*, 2013 COA 56, ¶ 1, —— P.3d ——. The People then petitioned this court for certiorari, asking whether the trial court may order a refund of restitution. We granted certiorari to consider whether a trial court may order refunds of costs and fees,[1] in addition to restitution.[2]

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[1] The issue of whether costs and fees may be refunded was preserved at the trial court level by Madden's motion. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (explaining that an

II. Standard of Review

¶ 6 Whether a trial court has authority to order a refund of costs, fees, and restitution presents a question of law, which we review de novo. *See People v. Porter*, 2015 CO 34, ¶ 8, 348 P.3d 922, 924. This case involves issues of statutory construction, which we also review de novo. *Mishkin v. Young*, 107 P.3d 393, 396 (Colo. 2005).

III. Analysis

¶ 7 As we explain in *People v. Nelson*, which we also issue today, a trial court must have statutory authority to order a refund from public funds.[3] *See* 2015 CO 68, ¶ 1, —— P.3d ——. None of the statutes governing the costs, fees, and restitution that Madden was ordered to pay address whether the court

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issue is preserved for appeal when the trial court is "presented with an adequate opportunity to make findings of fact and conclusions of law on [the] issue").

[2] We granted certiorari to review whether the trial court may order a refund of not only restitution, but also costs and fees. See C.A.R. 3(a) ("Content of the notice of appeal is not jurisdictional."); C.A.R. 49(a) (stating that this court's review on writ of certiorari "is a matter of sound judicial discretion"). Specifically, we granted certiorari on the following issue: "Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him."

[3] As we noted in *People v. Nelson*, "any potential refund of restitution could come only from a public fund." 2015 CO 68, ¶ 40 n. 4, —— P.3d ——. Neither the court nor defendants may force victims to return money that they received as restitution under these circumstances. *Id.*

may draw on those funds. Similarly, procedural rules for defendants seeking post-conviction relief do not address whether a court may order refunds from public funds. See C.R.C.P. 60(b); Crim. P. 35(a). Moreover, sections 13–65–101 to –103, C.R.S. (2015) ("the Exoneration Act" or "the Act") "created an exclusive process for exonerated defendants seeking a refund of costs, fees, and restitution." Nelson, ¶ 44. Therefore, because the trial court did not have statutory authority to draw on public funds—outside of the procedures created in the Exoneration Act—it did not have authority to refund costs, fees, and restitution to Madden.

¶ 8 The power to collect, manage, and distribute public funds is inherently legislative, and the court may not intrude on those powers without constitutional or statutory authority. *Nelson*, ¶ 40 (citing Colo. Const. art. III); *see also People v. Dist. Ct., City & Cty. of Denver*, 808 P.2d 831, 835 (Colo. 1991) (noting that a monetary award "payable from public funds implicates sensitive budget and funding considerations, and authority to intrude into these areas is not to be lightly implied" and holding that such an award "is beyond the authority of the trial court"). For this reason, a trial court must have statutory authority to order a refund from public funds. *Nelson*, ¶ 41.

¶ 9 None of the statutes supporting the costs, fees, and restitution that Madden paid contemplate a trial court issuing refunds to defendants. Madden incurred many of the same fines as the defendant in *Nelson*, and we determined that none of the statutes governing those fees and restitution allow for a re-

fund. *See* ¶ 44 (determining that statutes governing the victim compensation fund, VAST fund, docket fees, time payment fees, and restitution do not authorize a court to order refunds from public funds).

¶ 10 Madden incurred several additional fees as well, but the statues governing these fees also do not contemplate refunding the fees to defendants. First, the court ordered Madden to pay a sex offender surcharge, which, once collected, is transmitted to the state treasurer to fund the sex offender surcharge fund. *See* § 18–21–103(2)(b), C.R.S. (2015). The General Assembly may appropriate money from this fund for the identification, evaluation, and treatment of adult sex offenders. § 16–11.7–103, C.R.S. (2015). Second, Madden was charged a special advocate surcharge. See § 24–4.2–104(1)(a)(II), C.R.S. (2003). Funds raised by this surcharge are added to the VAST fund in the judicial district where the offense occurred. *Id.* Third, Madden was charged "drug standardized assessment" and "drug testing" fees for services to monitor his substance use. See §§ 16–11.5–102, 18–1.3–209, C.R.S. (2015). Finally, he was charged a $128.00 sex offender identification fee. See § 16–11–102.4, C.R.S. (2015). Sex offender identification fees are deposited into the offender identification fund, located in the state treasury. §§ 16–11–102.4(4), 24–33.5–415.6, C.R.S. (2015). The legislature appropriates money in this fund for genetic testing of sex offenders. § 24–33.5–415.6.

¶ 11 All of these statutes governing costs, fees, and restitution explain when the fines should be imposed, how they should be collected, and how that money may be used. *See Nelson*, ¶ 39; *see also, e.g.*, §

18–1.3–209 (noting that drug standardized assessments are conducted "at the expense of the person assessed"); § 24–33.5–415.6 (describing the offender identification fund and how that money may be used). Here, Madden paid $757.75 as restitution, which was paid to the victim's counseling service; and $1,220.00 in costs and fees, which went to the victim compensation fund and the VAST fund. *See* § 16–18.5–110, C.R.S. (2015) (listing the order for crediting payments to different funds); § 24–4.2–104(1)(a)(I), C.R.S. (2015) (directing that the special advocate surcharge be deposited into the VAST fund). Because these statutes clearly state how money in these funds is to be used—and do not address the possibility of refunds—they do not permit the trial court to order a refund from these funds. *See Nelson*, ¶¶ 37–39.

¶ 12 The parties point to two procedural rules that allow a court to grant a party post-conviction relief, suggesting that these provisions authorize a court to issue refunds. *See* C.R.C.P. 60(b); Crim. P. 35(a). However, neither rule addresses the court's authority to order a refund. C.R.C.P. 60(b) permits a court to "relieve a party ... from a final judgment, order, or proceeding" under certain conditions, including:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (3) the judgment is void;

> (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (5) any other reason justifying relief from the operation of the judgment.

¶ 13 In this case, C.R.C.P. 60(b) permitted the court to hear Madden's motion seeking relief from his vacated conviction, but it did not give the court the authority to draw on public funds. The court had authority to grant Madden relief from his now-vacated conviction: the trial court released Madden from the obligation to register as a sex offender. C.R.C.P. 60(b) empowered the court to order this relief because it did not implicate "sensitive budget and funding considerations." *See Dist. Ct.*, 808 P.2d at 835. C.R.C.P. 60(b) does not, however, address a trial court's ability to order a refund, or explain how a refund might be financed. Therefore, C.R.C.P. 60(b) does not authorize a court to order a refund from public funds.

¶ 14 Next, Madden argues that Crim. P. 35(a) permits a trial court to order a refund. Crim. P. 35(a) allows a court to "correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner." As we explained in *Nelson*, money that is withheld pursuant to clear statutory authority while a conviction is in place is not wrongfully withheld. ¶ 48. Because the court had

statutory authority to order Madden to pay costs, fees, and restitution in connection with his conviction, the order was authorized by law and the fines were not imposed in an illegal manner. *Contra* Crim. P. 35(a). Therefore, Crim. P. 35(a) does not apply in this case, and it did not grant the trial court authority to order a refund from public funds.

¶ 15 Finally, we note that the Exoneration Act provides the proper procedure for seeking refunds when a defendant has been exonerated. *See* §§ 13–65–101 to –103. When we interpret multiple statutes, a specific provision prevails over a general provision. *Nelson*, ¶ 43 (citing *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168, 1174 (Colo. 1991); § 2–4–205, 1B C.R.S. (1980) (now codified at § 2–4–205, C.R.S. (2015))). Neither the statutes governing the imposition and management of costs, fees, and restitution nor the procedural rules that allow for post-conviction relief directly address whether a defendant may receive a refund. By contrast, the Exoneration Act specifically identifies a procedure and a source of funding for exonerated defendants seeking refunds of costs, fees, and restitution. § 13–65–103(2)(e)(V).

¶ 16 Therefore, when a defendant's conviction is vacated and the prosecution elects not to retry him, a trial court may only authorize a refund of costs, fees, and restitution pursuant to the process created in the Exoneration Act. Madden did not seek a refund through this process.[4] Accordingly, the trial

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[4] The Exoneration Act allowed defendants to seek relief, even if they met the criteria prior to the Act's passage, as long as they

court lacked the authority to order a refund of Madden's costs, fees, and restitution. *See Nelson*, ¶ 45.

IV. Conclusion

¶ 17 The trial court did not have the authority to grant a refund of costs, fees, and restitution to Madden. The Exoneration Act provides the only procedure for exonerated criminal defendants to seek refunds of costs, fees, and restitution. Accordingly, we reverse the court of appeals' ruling and remand the case for proceedings consistent with this opinion.

JUSTICE HOOD dissents.

JUSTICE GABRIEL does not participate.

JUSTICE HOOD, dissenting.

¶ 18 Louis Madden sought a refund of the costs, fees, and restitution he paid on account of two invalid criminal convictions. The trial court determined he was entitled to reimbursement for the costs and fees but not the restitution. The court of appeals determined he could also get back the restitution money. *People v. Madden*, 2013 COA 56, ¶ 1, —— P.3d —— —. The majority now concludes he is entitled to nothing. *See* maj. op. ¶¶ 1, 7.

¶ 19 I believe the court of appeals got it right, and I would therefore affirm that court's well-reasoned opinion authored by then-Judge Gabriel. In today's

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acted before June 5, 2015. § 13–65–102(1)(b)(II), C.R.S. (2015). Madden did not seek a refund through procedures created by the Act in the allotted two-year time frame. Therefore, we do not consider whether he met the other criteria that the Act demands, such as actual innocence.

companion case of *People v. Nelson*, 2015 CO 68, ¶ 53, —— P.3d —— (Hood, J., dissenting), I conclude that a defendant who wins reversal on direct appeal is entitled to a full refund. For the reasons I articulate in *Nelson*, I would also permit the district court to grant the same relief to Madden. Because the majority concludes the district court lacked authority to award Madden a refund, I respectfully dissent.

¶ 20 Madden's case reached us in a procedural posture distinct from *Nelson*. I do not believe this difference should matter, but I write briefly to address a contrary view.

¶ 21 A jury convicted Madden of two offenses. He appealed, and we reversed his conviction for attempting to patronize a prostituted child because the State presented no evidence that Madden took part in an exchange of value to engage in sex with a child. *See People v. Madden*, 111 P.3d 452, 454, 459–60 (Colo. 2005). Left standing was Madden's conviction for third degree sexual assault.

¶ 22 On collateral review, Madden argued that this remaining conviction was invalid because the lawyer at his trial was constitutionally ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In 2009, the district court agreed with him. Madden had "clearly shown" his counsel was deficient. Among other things, Madden's counsel solicited testimony concerning a harmful rumor about his client that was "inadmissible double or triple hearsay," allowed a police officer to testify to the alleged victim's truthfulness, and invited into the case other "extremely

damning" evidence. The court was convinced there existed a reasonable probability that, but for these errors, Madden would not have been convicted. It therefore vacated his conviction. The People did not retry him, and thus, Madden has never been validly convicted.

¶ 23 As I explained in *Nelson*, defendants are not constitutionally entitled to a direct appeal, but, when the legislature establishes such a right, defendants are entitled to due process throughout that appeal. *See Nelson*, ¶ 58 (Hood, J., dissenting). Similarly, there is no constitutional right to post-conviction review. *See People v. Wiedemer*, 852 P.2d 424, 438 (Colo. 1993) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)). Colorado nonetheless provides for collateral challenges. *See* § 18–1–410, C.R.S. (2015); Crim. P. 35. Thus, defendants have statutory rights to challenge their convictions directly and collaterally, though the procedures are quite different. *See Jurgevich v. Dist. Court*, 907 P.2d 565, 567 (Colo. 1995) ("A collateral attack ... does not invoke the same rights as a direct appeal." (citing *Wright v. West*, 505 U.S. 277, 287–93, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (plurality opinion))). But whichever procedural road a defendant travels, I fail to see why the State is entitled to retain the funds paid by a defendant who ultimately shows his conviction is invalid.

¶ 24 I acknowledge at least one court has seen fit to draw a distinction between the relief available following a reversal on direct appeal and following a collateral invalidation of a conviction. *See United States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir.

2004). I am not persuaded by the Ninth Circuit's reasoning. In *Hayes*, a defendant won post-conviction relief because of a Sixth Amendment violation, and the government elected not to retry him. *Id.* at 1227–28. Hayes then sought a refund from the United States for the payments he made while subject to his invalid criminal conviction. *Id.* at 1228. The panel, citing *Telink, Inc. v. United States*, 24 F.3d 42, 46–47 (9th Cir. 1994), agreed he could be reimbursed for costs and special assessments, but it concluded that, in the post-conviction context, a refund of restitution depends on whether and when the government disbursed the funds. *See Hayes*, 385 F.3d at 1229–30. The court concluded that even an invalidly convicted defendant cannot recover from the government money it no longer has so long as the government waited until the conviction was final before disbursing the money. *Id.* at 1230. The Ninth Circuit compared the government's role to that of an escrow agent, and it rejected the defendant's view that the government must not disburse any funds before a defendant exhausts his collateral challenges. *See id.* at 1230 & n.6. By granting Madden a refund of his costs and fees while denying him a restitution refund, the trial court in this case effectively arrived at the same result.

¶ 25 While I agree the government has a legitimate interest in effectuating its system of restitution payments for crime victims—among the legislatively declared purposes of the system is the "expeditious" collection and "timely" distribution of compensation, § 18-1.3-601(1)(g)(I)–(II), C.R.S. (2015)—I find the Ninth Circuit's escrow analogy inapt, at least for the

situation here. The State is not required to sit on the restitution money of all defendants through collateral or direct review; it must only reimburse those defendants who are never validly convicted. The legislature is free to determine the best means of providing for these refunds. *See Nelson*, ¶ 79 (Hood, J., dissenting).

¶ 26 Moreover, a distinction between direct and collateral review would devalue certain constitutional rights purely on the basis of which procedural tool a defendant used to vindicate them. For example, a defendant who suffered a Fourth Amendment violation could receive a full refund if he sought direct review of his suppression motion, while a defendant who suffered a Sixth Amendment violation could not receive a full refund if he sought review through a collateral challenge. Madden used the collateral process and demonstrated that his conviction was obtained in violation of the Sixth Amendment. He too should be placed in the status quo ante. As this court has previously remarked, "[U]nconstitutional convictions, in addition to being of suspect reliability, abridge the very charter from which the government draws its authority to prosecute anyone." *People v. Germany*, 674 P.2d 345, 349 (Colo. 1983).

¶ 27 Thus, I conclude Madden is just as entitled to a refund of his costs, fees, and restitution as a defendant winning reversal on direct appeal. For the reasons given in my dissent in *Nelson*, I therefore respectfully dissent.

APPENDIX C

Colorado Court of Appeals, Div. VI

The PEOPLE of the State of Colorado, Plaintiff–Appellee,
v.
Shannon NELSON, Defendant–Appellant.

Court of Appeals No. 11CA1206
Announced April 25, 2013
Rehearing Denied June 6, 2013

Opinion by JUDGE GABRIEL

¶ 1 Defendant, Shannon Nelson, formerly known as Shannon Gonser, appeals from the district court's order denying her motion for a refund of the restitution paid while she was incarcerated in the Department of Corrections (DOC). Addressing an apparent matter of first impression in Colorado, we hold that a defendant whose conviction is overturned on appeal is entitled to seek a refund of the restitution paid in connection with the overturned conviction when the People fail to prove on remand the defendant's guilt of the charged crimes beyond a reasonable doubt (e.g., due to a subsequent acquittal or a decision not to retry the defendant). We further conclude, also as a matter of first impression, that such a defendant may seek the refund of restitution from the state in his or her criminal case without having to file a separate proceeding.

¶ 2 Accordingly, we reverse the district court's order and remand for further proceedings.

I. Background

¶ 3 Nelson was charged with forty counts related to the alleged sexual assault and physical abuse of her four children. Following a jury trial, she was convicted on five counts and sentenced to the DOC. The district court also ordered Nelson to pay restitution, court costs, and fees totaling $8192.50, of which $7845 was for restitution.

¶ 4 As pertinent here, the DOC subsequently withheld $681.35 from Nelson's inmate account and applied that sum toward the restitution, fees, and costs. The breakdown contained in Nelson's opening brief indicating how this sum was allocated does not total $681.35, but Nelson asserts that $390.67 of the total amount withheld was applied to the restitution owed.

¶ 5 Nelson appealed her convictions, and a division of this court reversed and remanded for a new trial. *People v. Gonser*, (Colo. App. No. 06CA1023, Apr. 9, 2009) 2009 WL 952492 (not published pursuant to C.A.R. 35(f)). At her second trial, Nelson was acquitted of all of the remaining charges.

¶ 6 Thereafter, Nelson moved for a refund of the restitution, fees, and costs that she paid while in the DOC. The district court, however, concluded that it lacked the authority to order such a refund and denied the motion.

¶ 7 Nelson now appeals.

II. Discussion

¶ 8 Nelson contends that the district court erred in concluding that it lacked the authority to order a refund of the restitution, fees, and costs that Nelson paid in connection with a conviction that was overturned when she was acquitted after retrial of all of the remaining charges against her. We agree that the district court erred.

A. Standard of Review

¶ 9 The question of whether the district court had the authority to order a refund of the restitution, fees, and costs that Nelson paid presents a question of law that we review de novo. *See People v. Pino*, 262 P.3d 938, 940 (Colo. App.2011).

B. Refund of Restitution, Fees, and Costs

¶ 10 The General Assembly has expressed its intent that restitution be awarded to crime victims. § 18–1.3–601(2), C.R.S.2012. Thus, every order of conviction of a felony, among other crimes, shall include consideration of restitution. § 18–1.3–603(1), C.R.S.2012.

¶ 11 When restitution may be awarded, the prosecution must prove the amount of restitution owed by a preponderance of the evidence. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). Because of the lower burden of proof for restitution than for a conviction, restitution may be awarded in connection with a criminal conviction for related but uncharged conduct. *Id.* at 731. Similarly, a division of this court has held that when a conviction is abated by operation of law due to the defendant's death, a restitution order issued in connection with that conviction need

not also be abated. *People v. Daly*, —— P.3d ——, —— (Colo. App. No. 10CA0580, June 9, 2011).

¶ 12 As the foregoing authorities make clear, restitution must be tied to a valid conviction, even if the amount is based on uncharged conduct that is related to the conduct on which the conviction was based. *See also People v. Brigner*, 978 P.2d 163, 164 (Colo. App. 1999) (noting that a defendant may not be ordered to pay restitution for losses that did not result from the conduct that was the basis of his or her criminal conviction). Thus, a division of this court has indicated that when a conviction is reversed and a case is remanded for a new trial, any restitution order imposed in connection with the conviction must be vacated, pending the outcome of the new trial. *See People v. Scearce*, 87 P.3d 228, 235 (Colo. App. 2003) (vacating a restitution order in connection with the reversal of a conviction on appeal).

¶ 13 Similarly, fees and costs imposed on a defendant must be tied to a valid conviction. *See* § 13–32–105, C.R.S.2012 (providing for a docket fee and surcharge to be assessed and collected from a defendant upon his or her conviction); § 16–18–101(1), C.R.S.2012 (providing that the costs in a criminal case shall be paid by the state when the defendant is acquitted); § 24–4.1–119(1)(a), C.R.S.2012 (providing for, among other things, costs to be levied against a defendant on each criminal action resulting in a felony conviction); § 24–4.2–104(1)(a)(I), C.R.S.2012 (providing for, among other things, a surcharge to be levied against a defendant on each criminal action resulting in a felony conviction).

¶ 14 Applying these principles here mandates that the restitution, fees, and costs imposed on Nelson in connection with her overturned conviction be vacated, because there is no valid conviction to which any such restitution, fees, and costs may be tied. The question thus becomes whether Nelson is entitled to seek, and the district court is authorized to award, a refund of the restitution, fees, and costs that Nelson has already paid.

¶ 15 With respect to the fees and costs, our supreme court has held that when a conviction is vacated, the parties should be "placed in *status quo* by refund to the defendant of the sums paid as fine and costs." *Toland v. Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961); *cf. People v. Noel*, 134 P.3d 484, 487 (Colo. App. 2005) (distinguishing *Toland* on the ground that it did not involve probation supervision fees and concluding that, because the purpose of probation is primarily rehabilitative, and because the defendant could have benefited from the services that she received and paid for, the district court did not err in denying the defendant's motion for a refund of the probation supervision fee). The People cite no authority contrary to *Toland*, and we are aware of none.

¶ 16 Accordingly, we conclude that Nelson was entitled to seek, and the district court was authorized to award, a refund of the fees and costs that Nelson paid in connection with her now overturned conviction.

¶ 17 With respect to restitution, although no published Colorado appellate decisions appear to have

addressed the question of whether a defendant in Nelson's position may seek a refund of the restitution previously paid, courts in other jurisdictions have done so. For example, in *Telink, Inc. v. United States*, 24 F.3d 42, 46 (9th Cir. 1994), the court rejected the argument that a petitioner who had filed a successful writ of error from a judgment was required to file a Tucker Act claim to recover fines or restitution stemming from a wrongful conviction. Rather, on the facts before it, which involved only fines and not restitution, the court agreed that the recovery of wrongly paid fines is incident to the vacating and setting aside of a wrongful conviction. *Id.* at 46–47. Thus, the court held that if the defendants were to prevail in setting aside their convictions, then the wrongly paid fines would be "automatically refunded" without requiring a civil action. *Id.* at 47.

¶ 18 Similarly, in *United States v. Beckner*, 16 F. Supp. 2d 677, 679 (M.D. La.1998), the court rejected the government's argument that because it had already disbursed the restitution funds, it should not be required to repay the defendant, observing, "The government offers neither logic nor authority to support this argument." The court thus held, "[T]his court has jurisdiction to carry out its obligation to completely vacate all aspects of the erroneous [judgment] issued by it." *Id.*

¶ 19 Finally, in *United States v. Venneri*, 782 F. Supp. 1091, 1093 (D. Md. 1991), the court observed, as pertinent here, that there is always a means for a person to recoup his or her losses when the loss takes the form of a monetary fine. The court added, "The interests of justice make it imperative that the

petitioner receive a refund of his restitution." *Id.* The court then proceeded to hold that the wrongfully convicted defendant was entitled to recover from a third party the restitution paid to that third party as a consequence of the defendant's unconstitutional conviction. *Id.* at 1094. In so holding, the court stated, "[P]rinciples of justice require no less than a full refund of that money." *Id.* at 1094–95; *see also United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled. Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines."). *But see United States v. Hayes*, 385 F.3d 1226, 1228–30 (9th Cir. 2004) (concluding that a defendant was not entitled to a refund of restitution when his conviction was affirmed on appeal, he ultimately filed a successful habeas corpus petition, and the government chose not to retry him, because the government had merely served as an escrow agent pending the final judgment, had paid the funds over to the victims at the proper time, and, thus, had acted properly).

¶ 20 We are persuaded by the reasoning of those cases in which courts have allowed a defendant to seek a refund of the restitution paid in connection with a conviction that is subsequently overturned either through an appellate reversal and a subsequent acquittal or through an appellate reversal and an ultimate decision not to prosecute or a dismissal

by the prosecution. In such cases, the state will have failed to prove that the defendant is guilty of the charged crimes beyond a reasonable doubt (which distinguishes such cases from a case like *Daly*, in which the conviction was abated only by operation of law and through no action of the prosecution).

¶ 21 Accordingly, we conclude that in addition to her right to seek a refund of the fees and costs that she paid, Nelson is entitled to seek, and the district court is authorized to award, a refund of the restitution that Nelson paid in connection with her overturned conviction.

C. Means of Obtaining Refund

¶ 22 Having so determined, we must address the mechanism by which Nelson may seek such a refund.

¶ 23 Although we have found no published Colorado appellate decisions directly on point, courts in other jurisdictions have concluded that a defendant who pays fines or restitution based on a conviction that is later set aside may seek a refund in the pending criminal case without having to file a separate civil action. *See, e.g., Telink*, 24 F.3d at 47 (noting that if the defendants prevail in setting aside their convictions, then "the wrongly paid fines would be automatically refunded, without requiring a civil action"); *Lewis*, 478 F.2d at 836 (discerning no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled, and not-

ing that the district court was empowered to require the repayment of the fines); *Cooper v. Gordon*, 389 So.2d 318, 319 (Fla. Dist. Ct. App. 1980) (holding that the district court had jurisdiction to entertain the defendant's motion for a refund of the fines, costs, and restitution that he paid before his conviction was reversed); *see also United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) (noting that property seized in a criminal proceeding may ultimately be disposed of by the court in that proceeding or in a subsequent civil action but stating, "It makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case."). *But see State v. Peterson*, 153 Idaho 157, 280 P.3d 184, 194 (Idaho Ct. App. 2012) (concluding that the district court lacked subject matter jurisdiction to grant a refund motion and that even if the court had such jurisdiction, it lacked personal jurisdiction over the nonparty agencies that collected, disbursed, or retained the amounts paid).

¶ 24 Although not directly on point, the division's decision in *People v. Hargrave*, 179 P.3d 226 (Colo. App. 2007), is instructive. In *Hargrave*, the division concluded that the district court in a criminal proceeding had ancillary jurisdiction, or inherent power, to entertain the defendant's post-sentence motion for the return of seized property. *Id.* at 230. Specifically, the division quoted with approval a case from the United States Court of Appeals for the District of Columbia Circuit, which stated that a court may exercise ancillary jurisdiction when:

> "(1) the ancillary matter arises from the same transaction which was the basis of the

> main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated."

Id. at 229–30 (quoting *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969)); *see also Yording v. Walker*, 683 P.2d 788, 791 (Colo. 1984) (concluding that the district court erred in holding that it lacked the authority to order a refund of some or all of the premium payment that the defendant had made to a surety as a result of the court's erroneous grant of bail).

¶ 25 We are persuaded by the reasoning in *Hargrave* and the above-described cases that hold that a defendant may seek a refund by filing a motion in his or her criminal case. Specifically, here, (1) Nelson's refund petition arose from the same transaction that was the basis of the main proceeding; (2) her petition could be determined without a substantial new factfinding proceeding; (3) deciding her refund petition would not deprive any party of a substantial procedural or substantive right; and (4) in our view, Nelson's refund petition must be settled to ensure that the disposition of the underlying crimi-

nal proceeding will not be frustrated. *See Hargrave*, 179 P.3d at 229–30.

¶ 26 Moreover, we conclude that judicial economy will better be served by allowing the matter of the restitution, fees, and costs to be resolved in the criminal proceeding by the court that tried the case, even if the criminal case has been concluded. *See Wilson*, 540 F.2d at 1104. And such a result is consistent with Crim. P. 57(b), which provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists.

¶ 27 We are not persuaded otherwise by the People's assertion that Nelson's request for a refund of restitution, fees, and costs amounts to an improper challenge to the DOC's management of inmates. The cases on which the People rely do not involve efforts to recover restitution, fees, or costs paid in connection with a subsequently overturned conviction. Rather, those cases involved challenges to the DOC's actions in enforcing orders for the payment of restitution, fees, and costs where, unlike here, the defendant's conviction had not been overturned. *See, e.g., People v. Carrillo*, 70 P.3d 529, 530–31 (Colo. App. 2002) (noting that the defendant's claims, which asserted that the DOC's practice of withhold-

ing restitution funds from his inmate account was illegal and unconstitutional, were not cognizable under Crim. P. 35(a) or 35(c)); *Jones v. Colo. Dep't of Corr.*, 53 P.3d 1187, 1191 (Colo. App. 2002) (concluding, among other things, that the district court lacked jurisdiction over the defendant's purported C.R.C.P. 106(a)(4) action demanding the return of restitution funds withheld from his inmate account, because the inmate was not challenging a judicial or quasi-judicial action of the DOC).

¶ 28 In reaching our conclusion here, we are not unmindful of the fact that in certain cases, the state may be required to refund monies that it has already disbursed to third parties (i.e., people and entities not controlled by the state). For several reasons, however, we believe that such a result is reasonable and appropriate.

¶ 29 First, it was the state's action that ultimately resulted in the wrongful payment of restitution.

¶ 30 Second, when the state chose to disburse the funds, it necessarily assumed the risk that the conviction could ultimately be overturned.

¶ 31 Third, we do not believe it appropriate to create a scenario in which former criminal defendants are left to seek out and file lawsuits or other proceedings against third parties, and especially crime victims, to recover the restitution amounts that the defendants previously paid.

¶ 32 Fourth, when a former defendant seeks a refund from the state, there is nothing to preclude the state, in its discretion, from seeking to recover such

restitution amounts from the third parties, and we view this as a more palatable option, given that the state would have had prior dealings with the victims and any service providers. In addition, the state would be in the best position to assess whether the amount of the restitution at issue or the impact on the victims or service providers justifies any effort to recover such funds.

¶ 33 Finally, in a situation like that present here, where either the former defendant or the state must bear the risk of a wrongly paid restitution award, we believe that the risk should rest with the state, which collected the restitution funds but then ultimately failed to prove its case and which would likely be better able to bear the risk.

¶ 34 In so holding, we note that this case has come to us with little case law or legislative guidance to assist us. Nonetheless, it was incumbent on us to decide the appropriate remedy here, and we have done so in a way that we believe is warranted and appropriate on the facts presented and existing law. We recognize, however, that cases like this present a myriad of issues, some of which appear to implicate difficult questions of public policy. Accordingly, we encourage the General Assembly to consider the questions presented in this case and in *People v. Madden*, 2013 COA 56, —— P.3d ——, which we are also deciding today.

¶ 35 In light of our foregoing disposition, we need not address Nelson's assertion that the denial of her motion for a refund of restitution violates certain of her federal and state constitutional rights.

III. Conclusion and Remand Order

¶ 36 For these reasons, the order is reversed, and the case is remanded to the district court to consider on the merits Nelson's motion for a refund of the restitution that she paid.

JUDGE LOEB and JUDGE VOGT* concur.

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S. 2012.

APPENDIX D

Colorado Court of Appeals, Div. VI

The PEOPLE of the State of Colorado, Plaintiff–Appellee,

v.

Louis MADDEN, Defendant–Appellant

Court of Appeals No. 09CA2081
Announced April 25, 2013
Rehearing Denied June 6, 2013

ORDER REVERSED AND CASE REMANDED WITH DIRECTIONS

Opinion by JUDGE GABRIEL

¶ 1 Defendant, Louis Madden, appeals the district court's order denying his request for a refund of restitution. For the reasons set forth in *People v. Nelson*, 2013 COA 58, —— P.3d ——, which we also decide today, we conclude that Madden is entitled to a refund of the restitution that he paid in connection with his vacated conviction and that he may seek such a refund from the state in the context of this case. Accordingly, we reverse and remand for further proceedings.

I. Background

¶ 2 Madden was convicted of attempted patronizing a prostituted child and attempted third degree sexual assault by force, and he was ordered to pay restitution in the amount of $910. The supreme

court ultimately reversed the conviction for attempted patronizing a prostituted child but upheld the attempted third degree sexual assault conviction. *People v. Madden*, 111 P.3d 452, 459 (Colo. 2005).

¶ 3 Thereafter, Madden sought relief pursuant to Crim. P. 35(c), arguing that his trial counsel was constitutionally ineffective. The postconviction court granted Madden's motion, vacated his remaining conviction, and ordered the prosecution to advise the court within thirty days whether it intended to retry Madden. The prosecution advised the court that it would not appeal the postconviction court's order or retry the case.

¶ 4 Madden then moved for a refund of the fees and costs, including the restitution, that he paid pursuant to his now vacated conviction. The postconviction court conducted a hearing on this motion and ordered a refund of all monies paid except for the restitution. Although the court expressly recognized that there was no longer any conviction, it stated that it could not see requiring the victim to have to pay anything back just because Madden's attorney was ineffective. In the court's view, "[i]t wasn't anything that [the victim] did wrong."

¶ 5 Madden now appeals.

II. Discussion

¶ 6 In *Nelson*, ¶ 1, decided today, we held that a defendant whose conviction is overturned on appeal is entitled to seek a refund of the restitution paid in connection with the overturned conviction when the People fail to prove on remand the defendant's guilt

of the charged crimes beyond a reasonable doubt (e.g., due to a subsequent acquittal or a decision not to retry the defendant). We further held that such a defendant may seek the refund of restitution from the state in his or her criminal case without having to file a separate proceeding. *Id.*

¶ 7 Applying that reasoning here, we conclude that Madden is entitled to a refund of the restitution that he paid in connection with his now overturned conviction and that he may seek a refund by filing a motion in this case.

¶ 8 In reaching this conclusion, we acknowledge that at least one court has held that a refund of restitution is inappropriate when a conviction was affirmed on direct appeal but all remaining charges were later dismissed in the context of a collateral attack on that conviction. Specifically, in *United States v. Hayes*, 385 F.3d 1226, 1228 (9th Cir. 2004), the defendant was convicted, and his conviction was affirmed on appeal, but he ultimately filed a successful habeas corpus petition, which resulted in an order vacating his conviction and requiring a new trial. The government, however, chose not to retry the defendant and dismissed the case, and the defendant filed a motion for a refund of the restitution, special assessments, and costs that he had paid. *Id.* The court granted the motion as to the special assessments and costs but denied it as to the restitution. *Id.* at 1230. With respect to the restitution, the court concluded that if the government retained restitution funds paid by the defendant until his or her conviction became final and then distributed those funds to the victims, then the defendant has no right

to recover such sums from the government. *Id.* The court reasoned that in such cases, the government merely served as an escrow agent pending the final judgment and at the proper time paid the funds over to the victims. *Id.* The court further observed that the government acted properly in holding the restitution funds until the conviction became final. *Id.*

¶ 9 We are not persuaded that we should adopt a rule that so distinguishes between cases in which a defendant is retried and acquitted after a reversal on appeal and those in which a conviction is ultimately nullified in the context of a collateral attack on that conviction. Such a distinction would rest the pertinent inquiry on whether the state had acted wrongfully. In our view, however, the proper focus should be on returning the defendant to the status quo ante. *See Cooper v. Gordon*, 389 So.2d 318, 319 (Fla. Dist. Ct. App. 1980) (holding that on reversal and remand for a new trial, the district court retained the inherent power "to correct the effects of its own wrongdoing and restore the petitioner to the status quo ante," and thus further holding that the district court had jurisdiction to entertain the defendant's motion for a refund of the fines, costs, and restitution that he paid before his conviction was reversed); *see also Toland v. Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961) (noting, in the context of a motion for a refund of fees and costs, that when a conviction is vacated, the parties should be returned to the status quo by allowing such a refund). In this regard, we agree with the court's statement in *United States v. Venneri*, 782 F. Supp. 1091, 1093 (D. Md. 1991), that in a case such as this, "[t]he interests of

justice make it imperative that the [defendant] receive a refund of his restitution."

¶ 10 We likewise are not persuaded by the People's assertion that because Madden was never exonerated, this case is analogous to the division's decision in *People v. Daly*, — P.3d ——, —— (Colo. App. No. 10CA0580, June 9, 2011). In *Daly*, the defendant's conviction was abated by operation of law when the defendant died while his appeal was pending. *Id.* at ——. Accordingly, in that case, the prosecution had proved the defendant's guilt beyond a reasonable doubt, and that judgment was never reviewed or overturned on its merits by an appellate court. Indeed, due to the defendant's death, the prosecution was deprived of the opportunity to defend its judgment on appeal, and the judgment was abated through no actions of the prosecution. *Id.* at ——.

¶ 11 Here, in contrast, Madden's conviction was vacated in postconviction proceedings, and the prosecution chose not to appeal the postconviction order or to retry the case. Thus, the prosecution did not ultimately prove Madden's guilt beyond a reasonable doubt, and as a result, there is no conviction to which restitution could properly be tied. *See Nelson*, ¶ 12 (noting that restitution must be tied to a valid conviction). In these circumstances, we conclude that the restitution order cannot stand. *See id.* Indeed, to hold otherwise would allow a prosecutor to preserve an unfounded restitution award merely by choosing not to retry a case in which the judgment was invalidated on appeal or in postconviction proceedings,

subject to retrial. In our view, such a scenario would be absurd, and, thus, we cannot countenance it.

¶ 12 Accordingly, we conclude that Madden is entitled to a refund of the restitution that he paid in connection with his now overturned conviction. We again note, however, as we did in *Nelson*, ¶ 34, that the issues presented in this case may well lend themselves to legislative action, and we encourage the General Assembly to consider these issues.

III. Conclusion and Remand Order

¶ 13 For these reasons, the order is reversed, and the case is remanded to the district court to award Madden a refund of the restitution that he paid in this case.

JUDGE LOEB and JUDGE VOGT* concur.

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S.2012.

APPENDIX E

District Court, County of Arapahoe
State of Colorado

The People of the State of Colorado
v.
Shannon Gonser

Case No. 05 CR 2119
May 5, 2011

The hearing in the matter commenced on Thursday, May 5, 2011, before the Honorable Marilyn Leonard Antrim, Judge of the District Court.

PROCEEDINGS

(The following proceedings were conducted in open court and entered of record:)

THE COURT: 2004 CR 652, Shannon Gonser, Shannon Nelson.

MR. DAWSON: Gary Dawson for the People.

MR. STUART: Martin Stuart on behalf of Ms. Nelson.

THE COURT: Ms. Nelson is not here. She is not on bond.

MR. STUART: She is in college and had a final today.

THE COURT: Well, that's more important than this, I think.

All right. You filed a motion, Mr. Stuart, and that's for a return of the restitution payments because she wasn't convicted.

What's your thinking, Mr. Dawson?

MR. DAWSON: Judge, my position is that what counsel is suggesting makes sense, however there is no statutory or appellate authority that authorizes it.

There is statutes of that cited in his motion, the authority for the Court to grant restitution.

There is, unfortunately, not a mechanism to reverse that. In essence, the Court has much authority to direct victim comp to return that money as to direct counsel to get that restitution for the first five people he sees outside the courtroom. There is just not a mechanism for this to take place, and to amplify, the Court is a creature of statute. A lot of things make sense that are constrained by statute, and he also cites to the constitution and a Court's inherent authority, however that is usually—I don't know—strained or directed by a statute. For example—

THE COURT: I get your point, Mr. Dawson.

MR. DAWSON: Thank you, Judge.

THE COURT: Thank you.

Well, Mr. Stuart, how do I have the authority to order that the victims return this money?

MR. STUART: Judge, I don't think you have the authority to order victims to return the money, but you certainly have the authority to order the Prosecution to do it.

I think the authority that I state in the motion is clear that if—I mean, if the Court doesn't have the authority to return money that was wrongfully taken from a person, then what authority does that Court have?

THE COURT: All right. Let me stop you here.

At the time that money was taken, it was not wrongfully taken, because Ms. Nelson had been convicted at that time.

Later, the Court of Appeals overturned the conviction, and at a second trial she was found not guilty of the first three or four counts that she was convicted of at the first trial. So it's not wrongfully taken. It was legally taken at the time because of the conviction, which was later overturned.

It was never given to the District Attorney, so far as I know.

Was it given to your office, Mr. Dawson?

MR. DAWSON: No, Judge. I don't think our office has it even cited in his motion as a party for that.

MR. STUART: Money was taken from Ms. Nelson's accounts at DOC.

THE COURT: Right, and given to the children. I would assume to the children for their therapy. It may have been given to the victim witness or Victims Compensation because they paid for the therapy.

MR. STUART: Which is run by the District Attorney's Office.

THE COURT: Well, I see your point. DOC was less than forthcoming when I asked them where the money went. All they would provide us with was a number of—the amount of money that they took from Ms. Nelson's account.

THE COURT: What amount is that again?

MR. STUART: $681.35.

THE COURT: I appreciate your position, Mr. Stuart, and I can certainly understand why Ms. Nelson wants the money returned.

In my opinion, I have no authority to do that, and so, I am denying your motion, and you are free to take this up on an appeal. It's an interesting issue.

MR. STUART: And we will.

THE COURT: All right.

(Whereupon, the hearing was adjourned.)

APPENDIX F

District Court, La Plata County
State of Colorado

People of the State of Colorado
v.
Louis Alonzo Madden

Case No. 00CR76
August 13, 2009

TRANSCRIPT OF PROCEEDINGS

Proceedings in the matter were held on August 13, 2009, before the Honorable Jeffrey R. Wilson, District Judge, in Durango, Colorado.

....

THE COURT: All right, 00CR76. This was in regard to the moneys that he's paid on the conviction that I vacated.

MR. WILLIAMSON: Right.

THE COURT: And I had the research attorneys do a little research for me, kind of looks like I can do whatever I feel like.

Any position, Mr. Risberg?

MR. RISBERG: Judge, I think that's between the Court and Mr. Madden.

THE COURT: Okay. Anything you want to say, Mr. Williamson?

MR. WILLIAMSON: Well, Judge, I believe that the only authority under restitution orders, 18-1.3-603, and judgment for cost of fines, 18-1.3-701, is if there's a conviction. And as a result of the 35(c) and the fact that the prosecution is not going to prosecute, there is no conviction, so I don't think there's any statutory authority to impose any fines, fees or restitution and they should be—

THE COURT: Is there any statutory authority for me to give it back?

MR. WILLIAMSON: I don't believe I'm aware of that. I didn't do as much research as I could, and I don't think we're going to end up with any law on that.

THE COURT: I don't think you are either. I mean, I had them look and there wasn't any.

MR. WILLIAMSON: And I wanted to cite, just briefly, due process and protections against double jeopardy, although due process is the main issue. Colorado Constitution, Article II, Section 16-25-18, and US Amendment 5 and 14. And then double jeopardy also within the US and Colorado Constitutions.

THE COURT: Okay. Well, I'm going to order that everything be returned except for the restitution that was paid.

I just—just because I vacated the conviction—that's one thing, but I just can't see requiring the charged victim to have to pay anything back on this whole situation because your attorney was ineffective. It wasn't anything that she did wrong. I don't have a problem ordering everything else being returned. And I'm not sure how that broke out in

terms of how much is which, but I know my clerks will figure that out.

THE DEFENDANT: Your Honor, the only point I would make is that the restitution amount wasn't paid to the victim directly, it was paid to a counseling service.

THE COURT: Right. And they would go after the victim or victim's comp, if they paid for that, which probably—would have the option to go after the victim in terms of getting the money. I don't know that they would, they would have that option.

And you can certainly appeal me. I don't think there's any law on it and I might be wrong, and if I am, the court of appeals can tell me that and order me what to do. Okay?

MR. WILLIAMSON: Okay.

....

THE COURT: Yeah, I'm ordering everything come back except for this $757.75, that's the amount that would not come back, Mr. Madden. Just so you know what that is.

THE DEFENDANT: Yes, Your Honor.

....

APPENDIX G

Colorado Supreme Court

The People of the State of Colorado
v.
Shannon Nelson

Supreme Court Case No.: 2013SC495
February 8, 2016

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 8, 2016.

JUSTICE HOOD would grant the petition

JUSTICE GABRIEL does not participate

APPENDIX H

Colorado Supreme Court

The People of the State of Colorado
v.
Louis Alonzo Madden

Supreme Court Case No.: 2013SC496
February 8, 2016

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 8, 2016.

JUSTICE HOOD would grant the petition

JUSTICE GABRIEL does not participate